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ESTATE PLANNING AND THE INDIAN ACT: PRACTICAL CONSIDERATIONS FOR ASSISTING INDIGENOUS CLIENTS LIVING ON RESERVE

By Gwenyth Stadig and Maddi Thomas*

Introductory Thoughts

When we began assisting Indigenous clients with status under the *Indian Act*[1] with drafting their wills, we found that there were few resources that addressed estate planning or estate administration matters under the *Indian Act*. We soon discovered that estate planning and estate administration present several unique considerations for Indigenous peoples to whom the *Indian Act* applies. In this article,[2] we highlight several of these key considerations, with a particular focus on Indigenous peoples with status under the *Indian Act* and living on reserve. We have canvassed the information available and have produced this article in the hope that it will serve as a high-level resource for lawyers who assist Indigenous clients with these specific legal needs.

Context: Estate Planning and Estate Administration

Generally speaking, estate planning is the process by which individuals anticipate and plan how to manage their assets during their lifetime and in preparation for their death or incapacity. Drafting a will is an integral part of the estate planning process, as

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1 R.S.C. 1985, c I-5 [*Indian Act*].

2 This article was originally published online in Wealth Matters - Miller Thomson, March 2, 2023: https://www.millerthomson.com/en/publications/communiques-and-updates/wealth-matters/march-2-2023/estate-planning-indian-act-considerations-assisting-indigenous-clients-living-reserve/ and is reproduced here with permission.

it dictates how an individual's assets will be distributed when they die. Estate administration is the process of organizing and distributing a deceased person's assets to the beneficiaries of their estate. A person is considered to have died intestate if they do not have a valid will.

Terminology is Important

The term "Indian" is outdated and offensive. In this article we will instead use the term "Indigenous person with status" — or "Indigenous peoples with status" — where possible. However, the term "Indian" still possesses legal meaning under the *Indian Act* as an Indigenous person "with status" and thus in certain circumstances it must be used.

The term "Indigenous" is an umbrella term for First Nations, Métis, and Inuit Peoples in Canada. However, in the context of estate planning and estate administration, the *Indian Act* only applies to Indigenous peoples who are members of a First Nation and have "status" under the *Indian Act*. Therefore, when we use the term "Indigenous" in this article, we are referring to someone who is a First Nations band member who has status and is living on reserve land. The term "First Nation" can describe a large ethnic grouping, such as the Cree Nation, or it can be synonymous with the term "band", which describes smaller communities.[3]

Relevant Sources Of Law

Federal legislation

Estate planning and estate administration are typically governed by provincial legislation in Canada. However, the federal government (or the "Federal Crown") possesses exclusive jurisdiction over "In[dians and Land Reserved for Indians" under section 91(24) of the *Constitution Act, 1867*.[4] This includes estate planning and estate administration matters. These powers are enacted through sections 42-50.1 of the *Indian Act*[5] and the *Indian Estates Regulations*.[6] In addition, the *Family Homes on Reserves and Matrimonial Interests or Rights Act*[7] ("*Family Homes Act*") was introduced by the federal government in 2013 to fill in certain legislative gaps related to the protection of spouses and common law partners of Indigenous peoples with status who are not otherwise protected by the *Indian Act*.

Provincial legislation

Many practitioners think provincial laws that do not conflict with the *Indian Act* or the *Indian Estate Regulations* are applicable to Indigenous peoples with status' estate planning and administration needs in accordance with section 88 of the *Indian Act*.[8] However, historical jurisprudence is not consistent on whether the *Indian Act* "constitutes a comprehensive testamentary code in respect of Indians".[9] Practitioners should therefore approach estate planning and estate administration for Indigenous clients with some caution, and be up to date with current provincial legislation.

Customary law

Customary law that does not conflict with the *Indian Act* may also be a relevant source of law for estate planning for Indigenous clients.[10] Customary law is described as traditional law of Indigenous peoples that reflects the "broad consensus of the membership of a First Nation",[11] and can include a First Nation's self-governance agreement. Interestingly, several self-governance agreements expressly override the *Indian Act*'s wills and estates provisions and replace them with applicable provincial law, the laws of the First Nation, or specific legal standards delineated in the relevant self-government agreements for individual testators: see: *Westbank First Nation Self Government Agreement*;[12] the *Sioux Valley Dakota Nation Self Government Agreement*;[13] and the *Tla'amin Final Agreement*.[14]

Where possible, customary law must be recognized as valid law to honour and respect Indigenous peoples' right to self-determination in the spirit of truth and reconciliation.[15]

For Estate Planning Purposes, To Whom Does The *Indian Act* Apply?

The *Indian Act* applies to "Indians" (i) with status; and (ii) who "ordinarily reside" on reserve land.[16]

With Status

Indian status (or registration) provides legal standing, along with certain rights and privileges, to a person registered under the *Indian Act*. Eligibility is based on descent in one's family. An Indigenous person must be First Nation to receive status, but not all First Nation Peoples qualify for status. For clarity, this means that in the context of estate planning and estate administration, the *Indian Act* applies to First Nations and it does not apply to Métis or Inuit Peoples. Métis and Inuit Peoples are recognized as "Indian" under section 91(24) of the *Constitution Act, 1867*; however, they are not eligible to receive status under the *Indian Act*.[17]

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3 Gadacz, René R. "First Nations in Canada." The Canadian Encyclopedia. Historica Canada. Article published February 07, 2006; last edited September 23, 2022.

4 *The Constitution Act*, 1867, 30 & 31 Vict, c 3.

5 *Supra* note 1.

6 *Indian Estates Regulations*, C.R.C., c. 954.

7 *Family Homes on Reserve and Matrimonial Interests or Right Act*, S.C. 2013, c. 20 [*Indian Estates Regulations*].

8 Section 88 of the *Indian Act* states: "Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the First Nations Fiscal Management Act, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provison is made by or under those Acts."

9 *Canada (Attorney General) v. Canard*, 1972 CarswellMan 69 [*Canard*] at para. 25; *Re Williams Estate* (1960), 32 W.W.R. 686, 1960 CarswellBC 89, [1960] B.C.J. No. 81 (S.C.), at paras. 9-12.

10 *Louis v. Canada (Indigenous Services)* at para. 1.

11 *Whalen v. Fort McMurray No. 468 First Nation*, 2019 CarswellNat 2106, 2019 FC 732 (F.C.).

12 Section 78(a): Westbank First Nation has jurisdiction in relation to the wills and estates of Members ordinarily resident on Westbank Lands who are Indians as defined under the *Indian Act*. *Westbank First Nation Self-Government Agreement*, at s. 78, online: https://www.wfn.ca/docs/self-government-agreement-english.pdf.

13 *Sioux Valley Dakota Nation Self Government Agreement,* s. 22.0, online: https://www.rcaanc-cirnac.gc.ca/eng/1385741084467/1551118616967.

14 *Tla'amin Final Agreement Act*, S.B.C. 2013, c 2 (in particular, Schedule — Chapter 17, ss 1-5).

15 Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action," s. 48(ii). Exhibits, accessed November 29, 2022, https://exhibits.library.utoronto.ca/items/show/2420.

16 *Supra* note 1, s. 4(3).

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Ordinarily Reside

Generally speaking, reserve land is land set aside by the federal Crown for the use and benefit of a particular First Nation.[18] The Crown is the legal titled owner of the land, but members of the First Nation have beneficial ownership and possession of the land, evidenced by way of a possessory certificate.

As discussed by the Supreme Court of Canada in *Canada (Attorney General) v. Canard*, 'ordinarily reside' has been held to mean:

> residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. . . it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences.[19]

Accidental or temporary absences, such as medical care, will not rescind a finding of "ordinary resident".[20]

Key Considerations

There are several key considerations for legal practitioners while handling the estate planning and estate administration of Indigenous peoples with status and who ordinarily reside on reserve land.

Federal Ministerial Powers

The Minister of Indigenous Services (the "Minister") is granted significant authority over wills and estates governed by the *Indian Act*.[21] This includes approving executors of an estate where there is a will, or appointing administrators where an individual died intestate.[22] *Indian Act* wills do not need to strictly comply with provincial laws in order to be valid, as per section 15 of the *Indian Estate Regulations*, as the Minister may "fix" wills that fail to technically comply with the *Indian Act*. In fact, no will is of legal force or effect until the Minister has approved the will or a court has granted probate.[23] It is unclear why these actions are still required to be undertaken by the Minister, rather than having such powers be delegated to the First Nations bands themselves.

Intestacy

The *Indian Act* imposes its own rules of estate division upon intestacy. For example, spouses are entitled only to the first $75,000 of an intestate's estate (compared to $350,000 under the *Succession Law Reform Act*, which applies to estates in Ontario not governed by the *Indian Act*).[24] Further, nieces and nephews are not entitled to an intestate's reserve land.[25]

Unfortunately, intestacy is highly prevalent for Indigenous peoples with status to whom the *Indian Act* applies. According to a government report, approximately 90% of Indigenous peoples with status and living on reserve land die without a will.[26] For context, in 2022 only 51% of Canadians who are not Indigenous peoples with status do not have a will.[27] This is problematic. Where an Indigenous person with status living on reserve does not have a will, the Minister must appoint someone to administer the estate.[28] This results in lengthy delays and a failure to capture the deceased's testamentary wishes. Comparatively, an intestate estate under provincial legislation is oftentimes administered by the deceased's family member.

Increasing access to knowledgeable and culturally competent lawyers at an accessible cost may result in lower rates of intestacies of Indigenous peoples with status. Although the Truth and Reconciliation Commission does not directly address this, it is in the spirit of reconciliation to promote Indigenous self-governance and independence in all facets of life.

Land Distribution

As discussed above, reserve land is held by the federal Crown for the benefit of a First Nation ("legal" title). Thus, individual Indigenous peoples with status who live on reserve land only have a possessory interest, which is evidenced by way of a possessory certificate ("beneficial" title).[29] Typically, off of reserve land, individuals own property in fee simple, which, put simply, means they own both the legal and beneficial title. Possessory certificates may be bequeathed only to members of the band, and the land transfer must be approved by the Minister. Often, there is poor documentation with respect to possession on a reserve, as many First Nations have their own ways of distributing land.[30] Thus, certainty of tenure is not absolute. This is one of the primary challenges that must be considered while drafting wills under the *Indian Act*: legal professionals must consider how these rules impact a grantor's rights and a beneficiary's eligibility. The beneficiary's eligibility to receive the certificate is determined by whether they possess status under the *Indian Act*.

Spousal Relief

Under the *Indian Act*, common law partners are recognized as beneficiaries. However, if the matrimonial home is on reserve land, it can only be passed on to a partner if the partner is an Indigenous person with status. The matrimonial home is the home ordinarily occupied by a person and their spouse as their family residence, and is granted certain protections under provincial legislation.

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17 See Reference as to whether "Indians" in s. 91 (24) of the *B.N.A. Act* includes Eskimo inhabitants of the Province of Quebec, [1939] S.C.R. 104; and *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, 2016 CarswellNat 1037 (S.C.C.).

18 We are not precluding other legal groups from having unique relationships with the Crown regarding reserve land title and use in Canada.

19 *Canada (Attorney General) v. Canard*, 1975 CarswellMan 32 (S.C.C.) at para. 59.

20 See *Earl v. Canada (Minister of Indian & Northern Affairs)*, 2004 CarswellNat 1944, 2004 FC 897 (F.C.) and *Dickson (Estate of)*, 2012 CarswellYukon 138 (Y.T. S.C.).

21 See ss. 45(2) and 18(1) of the *Indian Act*.

22 *Indian Estate Regulations, supra* note 6, at ss. 9 and 11.

23 See s. 45(3) of the *Indian Act*.

24 See s. 48 of the *Indian Act*, and ss. 44 and 46 of the *Succession Law Reform Act, R.S.O. 1990, c. S.26.*

25 See *Okanagan Indian Band v. Bonneau*, 2003 CarswellBC 1155, 2003 BCCA 299 (B.C. C.A.).

26 Final Report: Evaluation of Indian Moneys, Estates and Treaty Annuities," Project Number: 1570-7/11003; citing AANO, 2nd Session, 41st Parliament; see also, British Columbia Assembly of First Nations "Wills and Estates", Governance Toolkit.

27 Korzinski, David. "What 'Will' Happen with Your Assets? Half of Canadian Adults Say They Don't Have a Last Will and Testament." Angus Reid Institute, April 1, 2022. https://angusreid.org/will-and-testament/#:~:text=A%20new%20Angus%20Reid%20Institute,that%20is%20up%20to%20date.

28 *Indian Estate Regulations, supra* note 6, at ss. 9 and 11.

29 See ss. 20 and 24 of the *Indian Act*.

30 Report of the Standing Committee on Aboriginal Affairs And Northern Development, May 2014, 41st Parliament, second session.

There are some remedies under the *Indian Act* and the *Family Homes Act* regarding the unique treatment of the matrimonial home. For example, the Minister may declare a will to be void if the will fails to appropriately provide for a person (i.e., a spouse or a child) for whom the testator had a responsibility to provide.[31] A spouse may apply for an order for exclusive possession under section 21 of the *Family Homes Act*, but this is rarely successful due to housing shortages and other legal and social concerns that many reserve lands face. *Toney v. Toney Estate*,[32] is one of the only published cases wherein an elderly and disabled widow without status was successful in obtaining an order for exclusive possession of the matrimonial home, which she shared with her husband, the First Nation's Chief, until his death.

Alternatively, and more commonly, a spouse may make an application under section 36 of the *Family Homes Act* for an equalization payment with respect to the matrimonial home within 10 months of the deceased band member spouse or common law partner's death. In many cases, enforcement of an equalization payment is difficult, even where court ordered, for the same reason that exclusive possession orders are rare.[33] This is contrasted with provincial treatment of the matrimonial home, where both parties are equally entitled to share in the full value at the date of separation or death regardless of who brought the home into the marriage.

Final Remarks

Lawyers who serve clients whose estate planning and estate administration goals are governed by the *Indian Act* should have a basic understanding of the topics discussed in this article in order to effectively meet the needs of these clients. Cultural competency and understanding is highly important in this area of the law,[34] as is a basic understanding of the *Indian Act*, *Indian Estate Regulations*, and *Family Homes Act*. We hope that this article will act as a primer for practitioners who assist Indigenous peoples with status and who live on reserve.

AVOIDING PROBATE IN ONTARIO: STRATEGIES TO MINIMIZE ESTATE ADMINISTRATION TAX

By Ian Spiegel and Abigail Korbin*

Obtaining probate for a will is the legal process through which the executor named in a will asks the court to confirm the validity of the will and the authority of the named executor. A probated will[1] is proof of an executor's authority to act as the estate trustee. A probated will is necessary in many cases, for example to make transfers of real property and securities. However, probate can be a time-consuming and expensive process in Ontario, taking several months to complete.

What Is A Probate Tax?

In Ontario, there is no "death tax", a concept found in the United States, giving the right to transfer assets on death. Instead, a tax, known as estate administration tax ("EAT") and levied under the *Estate Administration Tax Act, 1998* (Ontario)[2] on the estates of deceased persons, must be paid in order for the court to probate a will.

The EAT is based on the "value of the estate"[3] and is calculated based on the fair market value of assets owned by the deceased at the time of death.[4] The amount of EAT due depends on the value of the estate. In general, an estate with a value in excess of $50,000 is taxed at 1.5%.[5] As of January 1, 2020, the EAT has been eliminated on the first $50,000 of the value of an estate.

While the EAT must be paid when obtaining a probated will, it can significantly reduce the value of an estate and leave less for the beneficiaries. EAT is not a deductible income tax expense for the estate or the deceased, and it is not "recovered" by being added to the adjusted cost base of the assets in the hands of the estate/beneficiaries.

Fortunately, several methods are used by estates practitioners to plan for minimizing EAT. Bare trust corporations and multiple wills are two commonly used planning methods, often used in tandem.

Bare Trust Corporation

A bare trust corporation is a corporation set up in order to act as the legal owner of certain assets that generally require probate. When a person transfers legal title to a bare trust corporation (coupled with a bare trust declaration by the corporation), they give up legal ownership of the assets but retain the right to control and manage the assets during their lifetime (i.e., beneficial ownership). The individual will be both the legal and beneficial owner of the shares in the bare trust corporation. Upon the person's death, legal title does not change (as it is owned by the corporation not the deceased individual), and the estate may transfer beneficial ownership without the need for probate.

A bare trust corporation can be used for investment accounts, bank accounts, art work, vehicles and real estate — essentially any asset that generally requires probate. Using a bare trust corporation has several benefits, including:

1. Avoidance of Probate: As the bare trust corporation is the legal owner of the assets, the assets will not be subject to probate upon your death. Shares of private corporations do not require probate in Ontario provided a secondary will is

31 See s. 46(1) of the *Indian Act*.
32 2018 CarswellNS 568, 2018 NSSC 179 (N.S. S.C.).
33 Stacey L. MacTaggart, "Lessons From History: The Recent Applicability of Matrimonial Property and Human Rights Legislation on Reserve Lands in Canada", (2015) UWO J Leg Stud, Article 3, at p. 10.
34 Guide for Lawyers Working with Indigenous Peoples, 2018 38th *Annual Civil Litigation Conference* 15C, 2018 CanLIIDocs 10788, https://canlii.ca/t/sqtb, retrieved on 2022-11-08, citing Nora Rock, "Providing high-quality service to Indigenous clients." LawPRO Magazine Volume 15, Issue 1 at p. 6 [online at: http://www.practicepro.ca/LawPROmag/High_Quality_Service_Indigenous_Clients.pdf].

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1 In Ontario, a probated will is a will for which a Certificate of Appoint of Estate Trustee has been issued.
2 S.O. 1998, c. 34, Sched.
3 Defined with reference to the *Estates Act*, R.S.O. 1990, c. E.21.
4 https://www.ontario.ca/page/estate-administration-tax#:~:text=%245%20for%20each%20%241%2C000%2C%20or,of%20the%20estate%20exceeding%20%2450%2C000.
5 As of January 1, 2020, the *Estate Administration Tax* has been eliminated for the first $50,000 of the value of the estate. See, <https://www.ontario.ca/page/estate-administration-tax>.

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prepared disposing of those assets, the intention being that the secondary will is not probated.
2. Privacy: Probate proceedings are public, which means that anyone can see the details of your estate. By using a bare trust corporation, you can maintain privacy as the details of your estate remain confidential.
3. Cost Savings: Using a bare trust corporation can help to reduce the costs associated with probate, including legal costs and the EAT.

However, probate planning using a bare trust corporation will not work if the deceased only has one will, and probate is required for any other asset(s) owned by the deceased individual at the time of death. In that case, the value of assets held in the bare trust corporation must be included in the value of the estate for probate tax. This issue can be addressed by preparing multiple wills, as discussed below.

Other potential drawbacks include the expense of incorporating the bare trust corporation, cost and inconvenience of annual corporate filings and potential application of new trust reporting rules to bare trust corporations. As well, it may be undesirable for personal reasons to hold assets in a bare nominee company name.

Notably, the Federal Underused Housing Tax[6] and Toronto Vacant Home Tax[7] appear to apply to corporate-owned residential properties. These taxes, and the filing/reporting requirements thereunder, will likely apply to properties owned by bare trust corporations.

Multiple Wills

Using "multiple wills" is a strategy involving the creation of a Primary Will and a Secondary Will.[8] Typically, a Primary Will deals with assets that require probate, thus incurring EAT, and a Secondary Will deals with assets that do not require probate in order to transfer title (i.e., shares in a private corporation acting as a bare trust).

Personal articles, most private company shares, and loans to private companies and family members normally do not require probate and are generally included in a Secondary Will and excluded from a Primary Will. A multiple wills strategy would involve creating a Secondary Will for these assets.

Multiple wills are often paired with the use of a bare trust corporation in order to minimize the assets that pass under the Primary Will, which requires probate.

Using a multiple wills strategy has several benefits, including:

1. Avoidance of Probate: You can ensure that only those assets requiring probate are processed through the probate process. The Secondary Will does not require probate.
2. Cost Savings: You can help to reduce the legal costs associated with probate and the payment of EAT by exempting certain assets from the process.
3. Estate Planning Flexibility: You can tailor your estate plan to meet your specific needs and ensure that your assets are distributed according to your wishes.

Disadvantages to Multiple Wills

The strategy of using multiple wills is not without potential for problems.

Care is required in drafting multiple wills to ensure that there are no administration issues following death. For example, it is recommended that the executors under both wills are the same. Also, if the residual beneficiaries under the primary and secondary will are different, for example, issues may arise regarding the payment of debts and taxes, whether it be under the primary or secondary assets. Careful drafting by an expert estate planning solicitor should avoid these problems, but there will be added cost given the time and care required to properly draft primary and secondary wills.

Conclusion

Using a bare trust corporation combined with multiple wills can be an effective estate planning tool for minimizing the costs associated with probate and EAT. While this strategy introduces several complexities and potential pitfalls, there is a clear advantage of ensuring that the assets are distributed without the payment of EAT, maximizing the assets of the estate.

It is important to seek the advice of an estate planning lawyer to determine the best estate planning strategy for you. Every estate plan is unique and the tax implications of each estate planning strategy should be carefully considered and addressed.

PUT A RING ON IT (AND TAKE IT BACK?)

By Michelle Raithby*

An engagement ring can hold a lot of value to the heart and wallet. But what happens with the ring if the engagement is called off? Is it considered a gift? Is it a failed contract? Do you morally have to return it?

Courts (and couples) have battled as to whether these rings should be classified as conditional gifts, unconditional gifts, or contracts. As is the case with anything law related, the evidence and evidentiary record will be key in the outcome.

With only a handful of cases on the topic, the courts have taken different approaches in determining the ownership of engagement rings. Historically, courts looked at who broke off the engagement – if the donor ended the relationship, the donee would keep the ring,

6 Online at <https://www.grllp.com/blog/Does-the-Underused-Housing-Tax-Apply-to-You-The-Answer-May-Surprise-You-410>.

7 Online at <https://www.grllp.com/blog/Toronto%E2%80%99s-New-Vacant-Home-Tax-A-Brief-Introduction-435>.

8 The use of multiple wills and grants of limited probate were approved by the Ontario Court of Appeal in *Granovsky Estate v. Ontario*, 1998 CarswellOnt 518 (Ont. Gen. Div.) and confirmed by the Ontario Superior Court in *Milne Estate (Re)*, 2019 CarswellOnt 843, 2019 ONSC 579 (Ont. Div. Ct.).

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and if the donee ended it, it had to be returned. Essentially, whoever ends the engagement loses their right to the ring.

But it is not as simple as that. . . That easy rule has not stood the test of time.

In the unfortunate event that an engagement is called off, the presumed standard is that the engagement ring should be returned to the person who gifted it. While there is no hard-fast legislative rule to this, judges have attempted to discern this based on the evidence at hand.

Section 33 of Ontario's *Marriage Act*[1] governs the return of gifts that were made in contemplation of marriage. According to this section of the *Act*, where a person makes a gift to another (in this case, an engagement ring) in contemplation of, or conditional upon, the marriage and the marriage fails to take place or is abandoned, the question of whether the donor caused the breakdown or is at fault is not relevant in determining the right of the donor in recovering the ring. In other words, fault for the engagement ending is not a valid consideration.

Some judges have found that engagement rings are unconditional gifts. In such cases, the ring is owned by the person who receives it. This position or argument can be tricky and may not hold up in all situations given that it is inconsistent with section 33 of the *Marriage Act*, which expressly refers to gifts made "in contemplation of or conditional upon" a marriage taking place.

On the other hand, some may argue that an engagement ring is a conditional gift in contemplation of the marriage. This may hold up in situations where the donor makes a timely demand for the return of the ring or if the ring is a family heirloom, especially where there is evidence of this.[2] The longer you stay silent on asking for the ring back, the more likely it will be deemed that the ring was intended as a gift and was meant to be kept by the recipient.

While timely demand is a consideration, it is not a stand-alone test for the return of engagement rings. Rather, the timing of the demand serves as important evidence as to the nature of the gift. If you delay in requesting the return of the ring, that could support a finding that the ring was an unconditional gift.

Conversely, in the case of *Lamacchia v. Carullo*,[3] the court held that the mother could keep the $14,000 engagement ring that was gifted to her on Christmas morning even though the father demanded its return just two months after they separated. The court found that the mother's evidence of Christmas being a traditional time for gift-giving, and her evidence of what the father said to her that morning, was more persuasive. The mother was granted the option of retaining the ring or returning it to the father for a $14,000 credit from the proceeds of the sale of the family home.[4]

Some tips we can offer on how to ensure you can get the ring back: Make it clear that the ring is a gift in contemplation of the marriage, and make sure you make a timely request for the return of the ring if the marriage fails to take place or is abandoned (and maybe don't propose on Christmas/traditional gift-giving days).

Overall, it's safe to presume that when an engagement is called off, engagement rings *should* be returned to the person who gave it to you unless there is evidence of a contrary intention by the person who gifted you the ring. At the end of the day, the evidence will play a significant role in determining whether the ring may or may not be recoverable.

It's also important to note that an engagement ring and other assets and property are treated differently when parties are married. We always recommend seeking the expertise of a lawyer who can help you sort out your affairs. Calling off an engagement can be a stressful and overwhelming experience. Our experienced team can ease the transition by looking into what rights you have, what assets are part of the relationship, how your assets and properties can be divided, and how to ensure your interests are best protected whilst achieving a fair and equitable outcome.

CHALLENGING THE VALIDITY OF WILLS WHILE A TESTATOR IS STILL ALIVE

By Kimberly Cura*

Can you challenge the validity of a will while the testator is still alive? In *Palichuk v. Palichuk*,[1] the Ontario Court of Appeal said no.

The background: Nina Palichuk has two daughters, Linda Palichuk and Susan Palichuk. On September 11, 2020, Nina executed four instruments:

1. A will that disinherited Linda and named Susan as the main beneficiary of her estate;
2. A continuing power of attorney for property that named Susan as the sole attorney;
3. A power of attorney for personal care that named Susan as the sole attorney;
4. A transfer and declaration of trust transferring Nina's home in Acton to Susan as a bare trustee.

Linda brought an application seeking a declaration that Nina was incapable of managing property and personal care and her appointment as Nina's guardian. She also sought the "opinion, advice, and direction of the Court" with respect to the above four instruments, claiming Nina was incapable of executing them or that they were executed as a result of Susan's undue influence over Nina.

Nina brought her own application, seeking to have Linda removed from an account held by Nina at BMO Nesbitt Burns. During the course of the litigation, Nina consented to be assessed by a geriatric psychiatrist, who found her to be capable of, among other things, making a will and granting and revoking powers of attorney for property and personal care.

The applications judge dismissed Linda's application, and Linda appealed. Her appeal raised several issues, but for the sake of brevity, this article will focus on only one of Linda's grounds of appeal: that the applications judge erred in failing to address the

1 R.S.O. 1990, c. M.3.
2 *Lamacchia v. Carullo*, 2022 CarswellOnt 1114, 2022 ONSC 687 (CanLII) at 60.
3 2022 CarswellOnt 16410, 2022 ONSC 6366 (O.N. S.C.).
4 *Ibid.*, at 61.

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1 2023 CarswellOnt 2031, 2023 ONCA 116 (Ont. C.A.).

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issue of undue influence with respect to Nina's execution of her testamentary documents.

During the hearing of the application, Linda attempted to have the applications consolidated and converted into an action, citing triable issues with respect to Nina's capacity to execute her testamentary documents and Susan's alleged undue influence over her. The applications judge declined to do so, essentially holding that the validity of the testamentary documents was contingent on Nina's death. Nina, still alive and having been found capable, could change her testamentary documents at any time, resulting in a waste of judicial time and resources. The Court of Appeal agreed with the application judge's decision.

Typically, a will may be challenged on the basis that the testator was incapable, the will is a product of undue influence, and/or the will was made under suspicious circumstances. The Court of Appeal held that determining the validity of a will "depends upon a future contingency – the testator's death" (para. 67). Trotter J.A. referred specifically to section 22 of the *Succession Law Reform Act*,[2] which provides that a will speaks from death.

The court also identified public policy reasons to prohibit will challenges before the death of the testator. Testators may change the will as often as they like prior to death. There is no way to determine what property will be left, if any, to distribute until after a testator dies. Beneficiaries may predecease the testator. If will challenges were permitted during a testator's lifetime, as Trotter J.A. said at para. 71, "the courts would be inundated with litigation that is hypothetical during the lifetime of the testator, with the potential for re-litigation after their death".

One aspect of the capacity issue that the Court of Appeal did not touch upon was the inherently fluid nature of capacity. A testator's capacity to make a will is determined right at the time they make the will. This can be problematic for testators whose medical records show a history of cognitive deficits. For example, a person with dementia could be lucid enough to meet all the requirements of the *Banks v. Goodfellow* test at the time of execution, and yet exhibit strong symptoms before and after. Accordingly, detailed notes by the drafting solicitor are critical in will challenge cases, and their evidence will be essential in determining whether or not the will is valid.

Palichuk also contains very helpful commentary from the Court of Appeal on capacity issues in guardianship applications, granting powers of attorney, and in making transfers of property.

[2] R.S.O. 1990, c. S.26.

COUPLE'S MOVE TO ONTARIO PUTS MILLIONS IN PLAY IN HIGH-STAKES DIVORCE CASE – SOMETIMES A FORMAL AGREEMENT ISN'T ENOUGH TO SATISFY THE FAMILY LAW COURTS

By Adam N. Black*

Wealthy families are no strangers to marriage contracts. But sometimes a formal agreement isn't enough to satisfy the family law courts. That was one of the lessons from a recent high-stakes divorce battle that highlighted the different family law regimes in Ontario and Quebec.

Following a 29-year marriage that started in Quebec and ended in Ontario, a wife sought a court order to set aside the marriage contracts into which she and her husband entered while residing in Quebec.[1]

If the wife was successful, she would be entitled to approximately $8 million from the husband on account of division of property. Not surprisingly, the husband resisted the wife's claim.

When the parties met in 1985, they were both pursuing MBAs at McGill University in Montreal. At the time, the wife was on a student visa and did not have permanent resident status in Canada. Shortly after her graduation from McGill, the wife was offered a job and was given five weeks to accept the job offer. Unfortunately, her immigration status prevented her from working in Canada. The couple sought legal advice and were given two options: 1) pursue permanent residence status which will take time or 2) get married. Given the time sensitivity of the job offer, the couple married.

One year later, while still residing in Quebec, the husband's family insisted the husband enter into a contract with his wife that would protect the husband's family business. Despite the wife's discontent with her in-laws' interference, the couple signed a contract called "Modification of Matrimonial Property Regime." The contract provided the couple was to be "separate as to property." Owing to subsequent changes to the legislation in Quebec governing matrimonial property, the couple signed a further contract two years later confirming the changes would not apply to them. They remained separate as to property.

In 1993, the couple relocated from Quebec to Ontario, where they lived until their separation in 2015. At that time, the husband's net worth was in the multi-millions, including shares in private corporations many of which were real estate holding companies with interests in, for example, shopping malls in Montreal. The wife's net worth was just a fraction of the husband's.

Shortly after separation, the wife commenced proceedings in the Ontario Superior Court of Justice. The principal issue in the case was whether the contracts, signed in Quebec, act as a bar to the wife's claims to share in the husband's net worth in accordance with the matrimonial property laws of Ontario. If so, the wife would be dis-

* This article was originally published online in the Financial Post on March 30, 2023: <https://www.torkinmanes.com/our-resources/publications-presentations/publication/couple-s-move-to-ontario-puts-millions-in-play-in-high-stakes-divorce-case> and is reproduced here with permission.

[1] *Torgersrud v. Lightstone*, 2022 ONSC 7084, 2022 CarswellOnt 18153 (O.N. S.C.).

entitled to an equalization payment she estimated to be more than $8 million.

Despite their disagreement, the couple agreed on one thing: if they had separated while still living in Quebec, the contracts would have entirely blocked the wife's property claims against the husband. In other words, the law of Quebec would have upheld the contracts. The couple's relocation to Ontario and the consequent application of the law of Ontario to the Quebec contracts makes the contracts susceptible to challenge.

After a two-day hearing in August 2022, Justice Adriana Doyle released her decision in December. Since the couple resided in Ontario at the time of their separation, Justice Doyle applied the laws of Ontario and quickly found the Quebec contracts met the formal requirements of a domestic contract under Ontario's *Family Law Act*.[2] Specifically, the Quebec contracts were "in writing, signed by the parties and witnessed and dealt with aspects of property division."[3]

But Justice Doyle took a deeper look at the contracts and found that, while they met the formal requirements, they did "not contain direct and cogent language" that would act as a bar to the wife's claims under the laws of Ontario for equalization of property. According to Justice Doyle, in Ontario "there is a high threshold that must be met before finding that an out of jurisdiction marriage contract prevails over the equalization provisions."[4]

She found the contracts fell short and did not override Ontario's laws, which would allow for an equalization payment on family property. The wife's precise entitlement will be determined at a further hearing.

Having achieved success in the hearing before Justice Doyle, the wife sought an order that the husband pay her legal fees in the amount of $408,665.51. The husband resisted, claiming that the wife's costs were excessive and that a two-day hearing did not warrant the wife's lawyers billing her for 680.8 hours of work.

In her decision released on March 13, 2023, Justice Doyle said that while the stakes in the case were high, the cost amount was disproportionate, and reduced the cost award to $265,106.73

Given the increasingly mobile population, it is important for couples to consider the impact a move to a new jurisdiction may have on an existing marriage contract. Such a move should be a catalyst for taking the marriage contract out of the desk drawer and having it reviewed by a lawyer in the new jurisdiction.

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2 R.S.O. 1990, c. F.3.
3 *Supra* note 1, at para. 169.
4 *Ibid*.

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(c) **Mots de passe**. Votre accès à certains produits et services est protégé par un mot de passe. Vous êtes responsable de l'attribution des mots de passe et de leur confidentialité. Le partage des mots de passe est strictement interdit. Chacun de nous doit maintenir des environnements informatiques conformes aux normes de l'industrie pour s'assurer que votre propriété et nous-mêmes sommes sécurisés et inaccessibles aux personnes non autorisées.

(d) **Technologie non autorisée**. Sauf avec l'autorisation préalable de Thomson Reuters, vous ne devez pas (i) exécuter ou installer de logiciel ou de matériel informatique sur nos produits, nos services ou notre réseau ; utiliser toute technologie pour télécharger, exploiter, capturer ou indexer automatiquement nos données ; et (ii) connecter automatiquement (via des API ou autrement) nos données à d'autres données, logiciels, services ou réseaux. Aucun de nous n'introduira sciemment de technologie ou de logiciel malveillant dans un produit, un service ou un réseau.

(e) **Renseignements sur l'utilisation**. Nous pouvons collecter des renseignements relatifs à votre utilisation de nos produits, de nos services et de nos données. Nous pouvons utiliser ces renseignements pour tester, développer et améliorer nos produits et services ainsi que pour protéger et appliquer nos droits en vertu de l'Accord, et nous pouvons transmettre ces renseignements à nos fournisseurs tiers aux mêmes fins.

(f) **Fournisseurs tiers**. Nos produits et services peuvent comprendre des données et des logiciels tiers. Certains fournisseurs tiers exigent que Thomson Reuters vous transmette des conditions supplémentaires. Les fournisseurs tiers modifient leurs conditions de temps à autre et de nouveaux fournisseurs tiers sont ajoutés à l'occasion. Pour consulter les conditions supplémentaires de nos tiers concernant nos produits et services, cliquez sur l'URL suivante : www.thomsonreuters.com/thirdpartyterms. Vous acceptez de vous conformer à toutes les conditions applicables aux tiers.

(g) **Logiciels complémentaires tiers**. Il se peut que vous ayez à fournir une licence pour un logiciel tiers afin d'utiliser certains de nos produits et services. Des conditions supplémentaires peuvent s'appliquer au logiciel tiers.

(h) **Limites**. Sauf avec l'autorisation expresse contraire mentionnée dans l'Accord, vous ne pouvez pas : (i) vendre, concéder en sous-licence, distribuer, afficher, stocker, copier, modifier, décompiler ou désassembler, manigancer, traduire ou transférer notre propriété en totalité ou en partie, ou en tant que composant de tout autre produit, service ou matériel ; (ii) utiliser notre propriété ou celle de nos fournisseurs tiers pour créer des œuvres dérivées ou des produits concurrents ; ou (iii) permettre à des tiers d'accéder, d'utiliser ou de bénéficier de notre propriété de quelque manière que ce soit. L'exercice des droits légaux qui ne peuvent être limités par un accord n'est pas exclu. Si vous fournissez des services de vérification, fiscaux, comptables ou juridiques à vos clients, cette Section 1 (h) ne vous empêche pas d'utiliser nos produits au bénéfice de vos clients dans le cours normal de vos activités. Sauf disposition expresse du présent Accord, nous conservons tous les droits et vous n'avez aucun droit sur nos produits, nos services et nos données.

(i) **Services**. Nous fournirons les services avec des compétences et des soins raisonnables. Les services professionnels applicables à votre commande, le cas échéant, sont décrits dans le document de commande ou un énoncé des travaux.

(j) **Sécurité**. Chacun de nous utilisera et exigera de tout processeur de données tiers d'utiliser les sauvegardes organisationnelles, administratives, physiques et techniques standard de l'industrie pour protéger les renseignements de l'autre partie. Chaque partie informera l'autre conformément à la loi applicable si cette partie a connaissance de l'accès non autorisé de tiers au contenu de l'autre partie et s'efforcera raisonnablement de remédier aux vulnérabilités de sécurité identifiées.

2. SERVICES DE RENSEIGNEMENTS

(a) **Licence**. Dans le cadre normal de votre activité et à des fins commerciales internes, vous pouvez uniquement visualiser, utiliser, télécharger et imprimer des données de nos services de renseignements à des fins individuelles et distribuer, de manière ponctuelle, irrégulière et ponctuelle, des extraits limités de nos données. De tels extraits et les données téléchargées, imprimées ou stockées ne peuvent atteindre une quantité telle qu'ils ont une valeur commerciale indépendante et l'utilisation de ces données comme substitut à tout service (ou partie substantielle) fourni par Thomson Reuters, nos filiales ou nos fournisseurs tiers est interdite. Thomson Reuters et le fournisseur de contenu tiers, le cas échéant, doivent être cités et crédités en tant que source d'utilisation ou de distribution des données. Les avis de droits d'auteur doivent être conservés sur les documents transmis ou imprimés. L'accès à certaines données peut être restreint en fonction de la portée de votre licence.

(b) **Distribution supplémentaire**. Vous pouvez également distribuer nos données : (i) aux utilisateurs autorisés ; (ii) au gouvernement et aux autorités de réglementation, sur demande spécifique ; et (iii) à des tiers conseillers, dans la mesure nécessaire, pour vous conseiller et à condition qu'ils ne soient pas concurrents de Thomson Reuters. Les lois applicables dans votre juridiction peuvent autoriser des utilisations supplémentaires.

3. LOGICIEL INSTALLÉ

(a) **Licence**. Vous pouvez installer et utiliser notre logiciel et notre documentation uniquement à des fins professionnelles internes. Les licences logicielles comprennent les mises à jour (correctifs de bogues, correctifs, versions de maintenance) et ne comprennent pas les mises à niveau (nouvelles versions ou versions qui comprennent de nouvelles fonctionnalités ou des fonctionnalités supplémentaires) ou les API, sauf mention expresse dans le bon de commande. Votre bon de commande détaille les installations autorisées, les utilisateurs, les emplacements, l'environnement d'exploitation spécifié et d'autres autorisations. Vous pouvez utiliser notre logiciel en code exécutable uniquement. Vous pouvez faire des copies nécessaires de notre logiciel uniquement à des fins de sauvegarde et d'archivage.

(b) **Livraison**. Nous livrons notre logiciel en le rendant disponible pour le téléchargement. Lorsque vous téléchargez notre logiciel et notre documentation, le cas échéant, vous les acceptez conformément à l'Accord.

4. LOGICIEL HÉBERGÉ DE THOMSON REUTERS

(a) **Licence**. Vous pouvez utiliser notre logiciel hébergé uniquement à des fins commerciales internes.

(b) **Livraison**. Nous livrons notre logiciel hébergé en vous fournissant un accès en ligne. Lorsque vous accédez à notre logiciel hébergé, vous acceptez de l'utiliser conformément à l'Accord.

(c) **Contenu**. Notre logiciel hébergé est conçu pour protéger le contenu que vous téléchargez. Vous autorisez Thomson Reuters à utiliser, stocker et traiter votre contenu conformément à la loi applicable. L'accès et l'utilisation de votre contenu par Thomson Reuters, nos employés et nos sous-traitants seront dirigés par vous et limités dans la mesure nécessaire pour fournir le logiciel hébergé, y compris la formation, l'assistance à la recherche, le soutien technique et d'autres services. Nous pouvons supprimer ou désactiver votre contenu si requis par les lois applicables et, dans de tels cas, nous déploierons des efforts raisonnables pour vous en informer. Si votre contenu est perdu ou endommagé, nous vous aiderons à restaurer le contenu du logiciel hébergé à partir de votre dernière copie de sauvegarde disponible.

5. FRAIS

(a) **Paiement et taxes**. Vous devez payer vos frais dans les 30 jours suivant la date de facturation dans la devise indiquée sur votre bon de commande. Si vous êtes un abonné non gouvernemental et que vous ne payez pas les frais qui vous sont facturés, vous êtes responsable des frais de recouvrement, y compris des honoraires d'avocat. Vous devez également payer les taxes et les droits applicables, autres que les taxes sur les revenus, en plus du prix indiqué, sauf si vous fournissez une preuve valide que vous êtes exempté. Les litiges relatifs aux factures doivent être notifiés dans les 15 jours à compter de la date de la facture.

(b) **Modifications**. Sauf indication contraire mentionnée dans le bon de commande, nous pouvons modifier les frais de nos produits et services à compter du début de chaque période de renouvellement en vous informant au moins 30 jours à l'avance.

(c) **Utilisation excessive**. Vous devez payer des frais supplémentaires si vous dépassez la portée d'utilisation spécifiée dans votre bon de commande, selon les tarifs qui y sont spécifiés ou nos tarifs standard actuels, selon le montant le plus élevé. Nous pouvons modifier les frais si vous fusionnez, acquérez ou êtes acquis par une autre entité, entraînant un accès supplémentaire à nos produits, à nos services et à nos données.

6. VIE PRIVÉE

Chacun de nous, à tout moment, traitera, protégera et divulguera les informations nominatives reçues à la suite du présent Accord (« Informations nominatives ») conformément à la loi applicable, et déploiera des efforts raisonnables pour s'entraider dans le cadre de l'enquête et du traitement de toute réclamation, de toute allégation, de toute action, de toute poursuite, de tout litige concernant la destruction, la perte, la modification, la divulgation ou l'accès non autorisés ou illicites aux Informations nominatives. Vous reconnaissez et acceptez le transfert et le traitement des Informations nominatives dans les régions géographiques nécessaires afin que Thomson Reuters remplisse nos obligations. S'il y a lieu, des conditions supplémentaires peuvent s'appliquer à l'Accord, y compris les conditions du Règlement général sur la protection des données (2016/679) (RGPD) disponibles au www.tr.com/privacy-information.

7. CONFIDENTIALITÉ

Les renseignements confidentiels reçus des parties ne seront divulgués à personne, sauf dans la mesure requise par la loi ou dans le cadre de l'Accord. Si un tribunal ou un organisme gouvernemental ordonne à l'une ou l'autre des parties de divulguer les renseignements confidentiels de l'autre, celle-ci sera rapidement avisée afin qu'une ordonnance de protection appropriée ou un autre recours puisse être obtenu, à moins que le tribunal ou l'organisme gouvernemental n'interdise l'avis préalable. Cette section doit être disponible pendant trois (3) ans après la résiliation de l'Accord ou jusqu'à ce que les renseignements ne soient plus considérés comme confidentiels en vertu de la loi applicable, selon la première éventualité.

8. GARANTIES ET EXCLUSION

LES GARANTIES DE CETTE SECTION SONT EXCLUSIVES AUX ÉTATS-UNIS ET EXCLUENT TOUTES LES AUTRES GARANTIES, CONDITIONS OU CLAUSES (EXPRESSES OU IMPLICITES), Y COMPRIS LES GARANTIES DE PERFORMANCE, DE QUALITÉ MARCHANDE, DE NON-VIOLATION, D'ADÉQUATION ET D'ACTUALITÉ. PAR LE PRÉSENT ACCORD, AUCUNE PARTIE NE S'EST FIÉE À LA DÉCLARATION, LA REPRÉSENTATION, LA GARANTIE OU L'ACCORD DE L'AUTRE PARTIE, SAUF CEUX QUI SONT EXPRESSÉMENT CONTENUS DANS LE PRÉSENT ACCORD.

(a) **EXCLUSION DES RESPONSABILITÉS. DANS TOUTE LA MESURE PERMISE PAR LES LOIS APPLICABLES, NOUS NE GARANTISSONS OU NE CONSTITUONS OU N'INCLUONS AUCUNE AUTRE CONDITION QUE LES PRODUITS OU SERVICES SERONT LIVRÉS EXEMPTS DE TOUTE INEXACTITUDE, DE TOUTE INTERRUPTION, DE TOUT RETARD, DE TOUTE OMISSION OU DE TOUTE ERREUR, OU QUE CEUX-CI SERONT CORRIGÉS. NOUS NE GARANTISSONS PAS LA VIE D'UNE URL OU D'UN SERVICE WEB TIERS.**

(b) **RENSEIGNEMENTS. NOS PRODUITS D'INFORMATION SONT FOURNIS « TELS QUELS » SANS AUCUNE GARANTIE, CONDITION OU CLAUSE D'AUCUNE SORTE.**

(c) **LOGICIEL. NOUS GARANTISSONS QUE NOS PRODUITS INFORMATIQUES SERONT CONFORMES À NOTRE DOCUMENTATION PENDANT 90 JOURS APRÈS LA LIVRAISON.**

(d) **EXCLUSION. VOUS ÊTES SEUL RESPONSABLE DE LA PRÉPARATION, DU CONTENU, DE L'EXACTITUDE ET DE L'EXAMEN DES DOCUMENTS, DES DONNÉES OU DES SORTIES PRÉPARÉS OU RÉSULTANT DE L'UTILISATION DE TOUT PRODUIT OU SERVICE, AINSI QUE DES DÉCISIONS OU DES ACTIONS PRISES EN FONCTION DES DONNÉES CONTENUES DANS OU GÉNÉRÉES PAR LES PRODUITS OU SERVICES. EN AUCUN CAS, NOUS OU NOS FOURNISSEURS TIERS NE POURRONS ÊTRE TENUS RESPONSABLES DES MONTANTS IMPOSÉS PAR TOUTE AUTORITÉ GOUVERNEMENTALE OU RÉGLEMENTAIRE.**

(e) **ABSENCE DE CONSEILS. NOUS N'OFFRONS PAS DE CONSEIL D'ORDRE FINANCIER, FISCAL, JURIDIQUE ET PROFESSIONNEL VOUS PERMETTANT D'ACCÉDER ET D'UTILISER NOS PRODUITS, NOS SERVICES ET NOS DONNÉES. VOS DÉCISIONS RELATIVES AUX PRODUITS OU SERVICES, OU À VOS INTERPRÉTATIONS DE NOS DONNÉES SONT DE VOTRE RESPONSABILITÉ.**

9. RESPONSABILITÉ

(a) **LIMITE. TOUTE RESPONSABILITÉ DES FOURNISSEURS OU DE SES TIERS, PENDANT TOUTE UNE ANNÉE CIVILE POUR LES DOMMAGES DÉCOULANT DE, OU RELIÉS À L'ACCORD, Y COMPRIS POUR NÉGLIGENCE, NE DÉPASSERA PAS LE MONTANT QUE VOUS AVEZ PAYÉ DANS LES 12 MOIS ANTÉRIEURS POUR LE PRODUIT OU SERVICE QUI EST LE SUJET DE LA RÉCLAMATION DE DOMMAGES. AUCUNE PARTIE NE SAURAIT ÊTRE TENUE RESPONSABLE DE DOMMAGES INDIRECTS, ACCIDENTELS, PUNITIFS, SPÉCIAUX OU CONSÉCUTIFS, OU DE PERTES DE DONNÉES ET DE BÉNÉFICES (DIRECTES OU INDIRECTES), MÊME SI CES DOMMAGES OU CES PERTES ONT ÉTÉ PRÉVUS OU PRÉVENUS.**

(b) **Responsabilité illimitée.** La Section 9 (a) ne limite pas la responsabilité de l'une ou l'autre partie pour (i) une fraude, une déclaration frauduleuse, une faute intentionnelle ou un comportement qui démontre un mépris inconsidéré des droits d'autrui ; (ii) la négligence causant la mort ou des blessures personnelles ; ou (iii) une violation des droits de propriété intellectuelle. La Section 9 (a) ne limite pas votre responsabilité en ce qui concerne la Section 9 (d) ou pour les demandes de remboursement découlant de cette section ; ou de payer les frais sur le bon de commande et tous les montants pour l'utilisation des produits et services qui dépassent les autorisations d'utilisation et les restrictions qui vous sont accordées.

(c) **Propriété intellectuelle de tiers**. Si un tiers vous poursuit en prétendant que nos produits, nos services ou nos données, excluant toute partie de ceux-ci fournit par nos fournisseurs tiers, enfreignent leurs droits de propriété intellectuelle et que votre utilisation de ces produits, de ces services ou de ces données se conforme aux conditions générales mentionnées dans l'Accord, nous vous défendrons contre la réclamation et les dommages-intérêts que le tribunal accorde finalement contre vous ou qui sont compris dans un règlement approuvé par Thomson Reuters, à condition que la réclamation ne résulte pas de : (i) une combinaison de tout ou d'une partie de nos produits, de nos services ou de nos données avec des technologies, des produits, des services ou des données qui ne sont pas fournis par Thomson Reuters ; (ii) la modification de tout ou d'une partie de nos produits, de nos services ou de nos données autrement que par Thomson Reuters ou nos sous-traitants ; (iii) l'utilisation d'une version de nos produits, de nos services ou de nos données, après que nous vous ayons informé d'une obligation d'utiliser une version ultérieure ; ou (iv) votre violation de cet Accord. Par notre obligation dans cette Section 9 (c), vous êtes conditionné (A) d'aviser rapidement Thomson Reuters par écrit de la réclamation ; (B) de fournir les renseignements que nous demandons raisonnablement ; et (C) d'autoriser Thomson Reuters à contrôler la défense et le règlement.

(d) **Vos responsabilités**. Vous êtes responsable (i) de vous conformer à cet Accord ; (ii) d'utiliser correctement nos produits et services conformément à toutes les instructions d'utilisation ; (iii) de respecter les exigences techniques minimales recommandées ; (iv) des modifications que vous apportez à nos produits, à nos services ou à nos données ; (v) de votre combinaison de nos produits, de nos services ou d'autres biens avec tout autre matériel ; (vi) de mettre en place et de maintenir une protection adéquate et appropriée contre les virus ou les logiciels malveillants et des systèmes de sauvegarde et de récupération appropriés et adéquats ; (vii) d'installer les mises à jour ; (viii) des réclamations présentées par des tiers en utilisant ou en recevant le bénéfice de nos produits, de nos services ou de nos données par vous, sauf les réclamations couvertes par la Section 9 (c) ; et (ix) des réclamations résultant de votre violation de la loi ou de la violation de nos droits ou de ceux de tiers. Vous devez nous rembourser les pertes que nous subissons en raison de votre non-respect de ces responsabilités ou autrement en lien avec ces responsabilités. Nous ne serons pas responsables du non-fonctionnement de notre produit en raison de votre logiciel tiers, de votre dysfonctionnement matériel, de vos actions ou de votre inaction. Si nous apprenons que notre produit a mal fonctionné en raison de l'un de ces problèmes, nous nous réservons le droit de vous facturer notre travail d'enquête sur la défaillance. À votre demande, nous vous aiderons à résoudre le problème moyennant des frais à convenir.

10. DURÉE, RÉSILIATION

(a) **Durée**. Les conditions de renouvellement des produits et des services sont décrites dans votre bon de commande. Sauf indication contraire mentionnée dans le bon de commande, l'Accord sera automatiquement renouvelé annuellement, sauf si l'un d'entre nous donne un préavis écrit d'au moins 60 jours à l'autre partie avant la fin de la période en cours.

(b) **Suspension**. Nous pouvons, sur préavis, résilier, suspendre ou limiter votre utilisation de tout ou d'une partie de nos produits, de nos services ou d'autres biens si (i) vous êtes invité à le faire par un fournisseur tiers, un tribunal ou un organisme de réglementation ; (ii) vous devenez ou êtes raisonnablement susceptible de devenir insolvable ou affilié à l'un de nos concurrents ; ou (iii) s'il y a eu ou qu'il est raisonnablement probable qu'il y aura : une violation de la sécurité ; un manquement à vos obligations en vertu de l'Accord ou d'un autre accord entre nous ; une violation de notre Accord avec un fournisseur tiers ; ou une violation des droits de tiers ou des lois applicables. Notre avis précisera la cause de la résiliation, de la suspension ou de la limitation et, si la cause de la suspension ou de la limitation de la résiliation est raisonnablement susceptible d'être corrigée, nous vous informerons des mesures que vous devez prendre pour rétablir le produit ou le service. Si vous ne prenez pas les mesures ou si la cause ne peut être résolue dans les 30 jours, nous pouvons suspendre, limiter ou résilier l'Accord en totalité ou en partie. Les frais demeurent payables en totalité pendant les périodes de suspension ou de limitation découlant de votre action ou inaction.

(c) **Résiliation**. Nous pouvons résilier tout ou une partie de l'Accord en lien avec un produit ou un service en cours de suppression. Chacun de nous peut résilier l'Accord immédiatement après un avis écrit si l'autre commet un acte de violation substantielle et ne parvient pas à remédier à la violation matérielle dans les 30 jours suivant son avis. Tout défaut de paiement d'un montant lorsqu'il est dû selon le présent Accord constitue une violation substantielle à cet effet.

(d) **Effet de la résiliation**. Sauf dans la mesure où nous en avons convenu autrement, à la résiliation, tous vos droits d'utilisation se terminent immédiatement et chacun de nous doit désinstaller ou détruire toutes les propriétés de l'autre et, sur demande, le confirmer par écrit. La résiliation de l'Accord (i) ne vous décharge pas de votre obligation de payer à Thomson Reuters les montants que vous devez, y compris

la date de résiliation ; (ii) ne touche pas d'autres droits et obligations accumulés ; ou (iii) ne résilie pas les parties de l'Accord qui, par leur nature, devraient continuer.

(e) **Modifications.** Nous pouvons modifier les présentes conditions générales de temps à autre en vous informant par écrit au moins 30 jours à l'avance. Vous pouvez demander des négociations de bonne foi concernant les conditions modifiées. Si les parties ne parviennent pas à un accord mutuel sur les conditions modifiées dans les 30 jours, vous pouvez résilier l'accord immédiatement après l'avis écrit.

11. FORCE MAJEURE

Nous ne sommes pas responsables des dommages ou des manquements à nos obligations en vertu de l'Accord en raison de circonstances indépendantes de notre volonté. Si ces circonstances entraînent des défaillances matérielles dans les produits ou les services et se poursuivent pendant plus de 30 jours, l'un ou l'autre de nous peut résilier tout produit ou tout service concerné sur avis à l'autre.

12. DROITS DES TIERCES PARTIES

Nos sociétés affiliées et nos fournisseurs tiers bénéficient de nos droits et de nos recours en vertu de l'Accord. Aucun tiers ne dispose de droits ou de recours en vertu de l'Accord.

13. GÉNÉRAL

(a) **Affectation**. Vous ne pouvez pas affecter, déléguer ou transférer l'Accord (y compris vos droits ou vos recours) à quiconque sans notre consentement écrit préalable. Nous pouvons céder ou transférer l'Accord (y compris l'un de nos droits ou recours) en totalité ou en partie à une société affiliée ou à toute entité qui succède à la totalité ou à la quasi-totalité des actifs ou des activités associées à un ou plusieurs produits ou services, et nous vous informerons de toute affectation ou de tout transfert. Nous pouvons donner en sous-traitance l'un des services à notre seule discrétion. Toute affectation, toute délégation ou tout autre transfert en violation de la présente Section 13 (a) est nul.

(b) **Commentaires**. Vous accordez à Thomson Reuters un droit perpétuel, irrévocable, transférable et non exclusif d'utiliser tous les commentaires, toutes les suggestions, toutes les idées ou toutes les recommandations que vous fournissez relativement à l'un de nos produits ou services de quelque manière et à quelque fin que ce soit.

(c) **Conformité à l'Accord**. Nos représentants professionnels ou nous-mêmes pouvons examiner votre conformité à l'accord pendant toute la durée de l'Accord. Si l'examen révèle que vous avez dépassé l'utilisation autorisée permise par l'Accord, vous paierez tous les frais impayés ou sous-payés.

(d) **Droit applicable**. Sauf indication contraire mentionnée dans le bon de commande, l'Accord sera régi par les lois de la province de l'Ontario et les lois fédérales du Canada qui s'y appliquent, et chacun de nous se soumet irrévocablement à la compétence exclusive des tribunaux de la province de l'Ontario et tous les tribunaux compétents pour entendre les appels contre ceux-ci et régler tous les litiges ou réclamations découlant de ou relié à l'Accord.

(e) **Préséance**. L'ordre de préséance décroissant est le suivant : termes de licence tiers contenus dans la Section 1 (f) de ces conditions ; le bon de commande applicable ; et les autres dispositions de l'Accord.

(f) **Essais.** Tous les essais de nos produits et services sont soumis aux présentes conditions générales, sauf avis contraire de notre part. L'accès à nos produits et services pour les essais ne peut être utilisé qu'à des fins d'évaluation.

(g) **Soutien fourni.** Pour aider à résoudre les problèmes techniques liés aux services, Thomson Reuters peut fournir un accès téléphonique ou en ligne à son service d'assistance, ou fournir des outils d'auto-assistance. Des renseignements supplémentaires sur le soutien fourni par Thomson Reuters sont disponibles au http://thomsonreuters.com/support-and-training ou comme prévu par Thomson Reuters.