Toronto Law Journal

Common Law Protection Afforded to Privileged Documents Turned Over to Regulators

By Alexander Gay, Department of Justice[i]

Companies are often faced with information requests from regulators. The documents requested are often privileged, which immediately leads companies to refuse disclosure unless compelled by law. In response, regulators rely on provisions of their enabling legislation, to the extent that they exist, to reassure the companies that disclosure is on a confidential basis and that there will be no public disclosure of the privileged information. While the debate between companies and regulators often centers on the enabling legislation and the protection that it may or may not afford to the documents, little thought is given to the common law doctrine of limited waiver which can provide for a measure of protection.

One of the foundational cases that deals with the doctrine of limited waiver is *British Coal Corporation v. Dennis Rye* [1988] 1 WLR 1113 (CA), where it was held that a party can provide privileged documents to a party for limited purposes, without waiving the privilege as against third parties. The party in receipt of the privileged document may be a federal or provincial regulator. The doctrine of limited waiver has not been applied widely in Canadian jurisprudence: see *Interprovincial Pipe Line Inc. v. M.N.R.*, [1996] 1 FCR 367, 1995 CanLII 3542 (FC); *Philip Services Corp v Ontario Securities* Commission, 2005 CanLII 30328 (ON SCDC). Within the context of criminal law, where a disclosure is made to the police for limited purposes, there is case law that holds that the disclosure does not result in a waiver of the privilege in a subsequent civil proceeding. The rationale for the application of the doctrine is that unless companies are permitted to make a disclosure to a regulator and preserve privilege claims, it impedes full and frank disclosure when it may be badly needed to protect the public interest. In some common law countries, the doctrine of limited waiver has even been used to limit the use of the privileged information by the regulator beyond its limited purpose: *British Coal Corporation v. Denis Rye* [1988] 1 WLR 1113 (CA), *B. v. Auckland District Law Society* [2003] UKPC 38. There is also case law which holds that the doctrine of limited waiver applies even after the privileged documents have been delivered to a regulator and the limited waiver that applies to the documents has not been communicated. For example, in *Citic v. Secretary of State for Justice* [2012] HKCA 153, the Hong Kong Securities and Futures Commission served an order requiring documents to be delivered to it. Six of the documents that were delivered were privileged. At the time that the documents were delivered, there was no express statement as to the limited basis on which they were provided. The police subsequently launched an investigation and Citic learned that the police were also seeking the documents. Citic sought to have the documents returned to it on the basis that its waiver of privilege did not extend beyond the limited purposes of the securities

investigation. Citic's claims were upheld, although the limited circumstances of the waiver were only expressed some time after the documents were handed over.

While privileged documents may be shared with a regulator for limited purposes without destroying the privilege claim, the problem that often arises is that regulators are unlikely to allow themselves to be bound by any restrictions on the use of the privileged documents by the holder of the privilege, especially where the regulator is attempting to fulfill a statutory mandate. Typically, the impasse is resolved through a "carve out", where the parties will agree that the disclosure of the privileged documents allows the regulator to disclose some of the privileged documents or information where required by law. The use of "carve outs" poses some difficulties for companies in that it often entails a waiver over what is eventually made public. However, companies can take some comfort in the fact that there is case law which holds that a "carve out" of the limited purposes provision does not destroy the privilege, unless and until it is used by the regulator. For example, in *Property Alliance Group Limited v. The Royal Bank of Scotland PLC* [2015] EWHC 1557, a bank delivered privileged documents to a regulator and the terms under which they were delivered allowed for further public dissemination by the regulator. The case confirms that the doctrine of limited waiver applies, even in the presence of a "carve out", as long as it is not used. Of course, once the information is made public by the regulator, the use of the "carve out" may give rise to a waiver of privilege.

While these propositions of law appear to be straightforward, there is tension in the case law on the application of the doctrine of limited waiver. The common law is not altogether prepared to live with the consequences of the privilege claim and continues to want the ability to ignore the doctrine of limited disclosure if it gives rise to a serious injustice. This was seen in *Goldberg v. NG* 137 ALR 57, where the Supreme Court of New South Wales ordered the inspection of documents which had been provided to the Law Society despite an express reservation of confidentiality, applying considerations of fairness. While the issue continues to be debated by the courts, a principled approach to the law dictates against an approach where the doctrine of limited waiver is left at the mercy of individual judges.

Given the state of the case law, companies wanting to provide privileged information to a regulator may do so without destroying any claim of privilege. This will require that the company provide the privileged documents in confidence, for limited purposes and making it clear to the regulator that any claim of privilege as it relates to third parties continues to apply. Failure to communicate that the information is for limited purposes is not fatal, although not helpful. The inclusion of a "carve out" in the terms setting out the limited purposes is not a waiver of privilege unless and until it is used by the regulator. The inclusion of a "carve out" may be a compromise solution for some companies, but it imposes risk on a company as it gives the regulators permission to publicly disclose some or all of the information.

---

[i] The views expressed by the author are not those of his employer the Department of Justice.

Toronto Law Journal

The Dangers of Dabbling in Franchise Law

David Kornhauser, Macdonald Sager Manis LLP, Debi Sutin, Gowlings WLG LLP and Peter Viitre, Sotos LLP

Lawyers sometimes engage in areas of practice for which they do not have sufficient expertise. If a lawyer is found not to have met the standard of care required of a lawyer in a particular matter, then the lawyer will be liable for damages suffered by the lawyer's client. This article will discuss the damages that a lawyer may be liable for when acting in a franchise-related matter.

In Ontario, the respective rights and obligations of franchisors and franchisees are in part governed by the *Arthur Wishart Act (Franchise Disclosure), 2000* (the "**Act**"). Chief among the obligations of the franchisor is the requirement that it deliver a disclosure document, that meets the requirements of the Act and the regulations made under it, to each prospective franchisee not less than 14 days before accepting any payment from the franchisee or having the franchisee sign any agreement in respect of the franchise. If the franchisor fails to discharge that obligation, the franchisee will have the right to rescind its franchise agreement and the franchisor will be obliged, pursuant to Subsection 6(6) of the Act, to essentially put the franchisee back in the position it was in prior to purchasing the franchise. If the franchisor can show that its failure to discharge those obligations resulted from its lawyer's failure to properly advise it of those obligations, the lawyer will be liable for that portion of the amounts the franchisor is required to pay under Subsection 6(6) of the Act that is attributable to the lawyer's negligence. And as is described in detail below, those amounts can be quite substantial.

A claim by a franchisee for post-rescission damages, for which a lawyer may be liable, will typically arise if:

1) The franchisor's lawyer failed to advise the franchisor of its disclosure obligation under the Act resulting in a franchisee exercising its right to rescind its franchise agreement pursuant to the Act; or

2) The franchisor's lawyer failed to prepare a compliant disclosure document to be used by its franchisor client, resulting again in a franchisee exercising its right to rescind its franchise agreement pursuant to the Act.

However, a franchisee's lawyer can also be liable if the lawyer fails to advise her franchisee client of its rights arising from the franchisee not receiving a compliant disclosure prior to purchasing the franchise, and the franchisee misses out on the opportunity to rescind its franchise agreement within the time period provided for under the Act.

September 2016

In each of these scenarios, the lawyer may be found to be liable for the post-rescission damages awarded to the franchisee. Furthermore, the errors made by the lawyer in these scenarios cannot be rectified. Accordingly, it is imperative that a lawyer advising a franchisor or a franchisee be familiar with the Act and, in particular, the disclosure obligation imposed upon franchisors.

In familiarizing herself with the Act, the lawyer should be aware that: (1) the main purposes of the Act are to protect franchisees and to ensure that prospective franchisees are provided with the information they need to make an informed decision about purchasing a franchise; (2) the Act is remedial legislation, enacted to redress the perceived imbalance of power between a franchisor and a franchisee; and (3) the Courts have given the Act, as well as the rights of franchisees and the obligations of franchisors under it, a broad and liberal interpretation.

Disclosure

In addition to the timing requirement, described above, Regulation 581/00 under the Act prescribes the information that must be contained in the disclosure document. This includes the business background of the franchisor and its directors and officers, bankruptcy and litigation history, an estimate of the franchisee's expected costs and expenses associated with establishing the franchised business, copies of all agreements relating to the franchise, contact particulars for current and former franchisees, and certain financial statements of the franchisor.

The overarching requirement is that a disclosure document must contain, in addition to the information prescribed by the Act and Regulations, all "material facts", which is defined in the Act as follows:

> "material fact" includes any information about the business, operations, capital or control of the franchisor or franchisor's associate, or about the franchise system, that would reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the decision to acquire the franchise.

Thus the disclosure requirements prescribed by the Act and Regulations are not exhaustive and care must be taken to ensure that any additional information that may be material is also included in a disclosure document.

A franchisor is also required, under subsection 5(5) of the Act, to provide a prospective franchisee with a written statement of any material change that occurs after the disclosure document is delivered to a prospective franchisee but before the franchise agreement or any agreement relating to the franchise is signed, or any consideration paid, by the prospective franchisee. "Material change" is defined in the Act as follows:

> "material change" means a change in the business, operations, capital or control of the franchisor or franchisor's associate, a change in the franchise system or a prescribed change, that would reasonably be expected to have a significant adverse effect on the value or price of the franchise to be granted or on the decision to acquire the franchise and includes a decision to implement such a change made by the board of directors of the franchisor or franchisor's associate or by senior management of the franchisor or franchisor's associate who believe that confirmation of the decision by the board of directors is probable (*emphasis added)*.

Remedies and Enforcement

As noted, if a franchisor fails to comply with the Act's disclosure requirements, a franchisee has the right to rescind (terminate) the franchise agreement. There are two separate, and seemingly distinct, time periods within which a franchisee can rescind under Section 6 of the Act. First, if a franchisor fails to deliver a disclosure document to a prospective franchisee within the time specified under the Act or if the disclosure document fails to comply with the disclosure requirements, the franchisee has the right, pursuant to subsection 6(1) of the Act, to rescind the franchise agreement no later than 60 days after receiving the disclosure document. Second, if a franchisor fails to deliver a disclosure document, a franchisee has the right to rescind the franchise agreement, pursuant to subsection 6(2) of the Act, no later than two years after entering into the franchise agreement. In addition, the Courts have held that a materially deficient disclosure document is deemed to be no disclosure, thus entitling a franchisee to rescind its franchise agreement under subsection 6(2) of the Act notwithstanding that it was in fact provided with some (albeit, deficient) form of disclosure document.

Within 60 days of the effective date of rescission, the franchisor is required, pursuant to subsection 6(6) of the Act: (a) to refund to the franchisee all monies received from the franchisee; (b) to purchase from the franchisee all inventory, supplies and equipment at the price paid by the franchisee; and (c) compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up and operating the franchise (net of the amounts paid by the franchisor under (a) and (b)).

In addition to rescission for failure to deliver a compliant disclosure document or statement of material change within the required time period, Section 7 of the Act provides a franchisee with the right to commence an action for damages if it suffers a loss because of a misrepresentation contained in the disclosure document or if the franchisor otherwise fails to comply with section 5.

Waiver of Rights/Contracting Out/Jurisdictional Issues

The Act imposes a prohibition on contracting out of the Act by providing in Section 11 that any purported waiver or release by a franchisee of a right given under the Act, or of an obligation or requirement imposed on a franchisor under the Act, is void. Finally, the Act provides that any provision in a franchise agreement which attempts to restrict the application of the law of Ontario or to restrict jurisdiction or venue to a forum outside Ontario is void with respect to a claim otherwise enforceable under the Act.

Conclusion

Given the serious potential claims that can arise in franchise-related matters, lawyers are well-advised to ensure that they are intimately familiar with the respective rights and obligations of franchisors and franchisees under the Act prior to advising either, and should not hesitate to engage or consult with a specialized franchise lawyer.

Toronto Law Journal

Confidentiality and Solicitor-Client Privilege After Death

By Umair Abdul Qadir, Hull & Hull LLP

It is trite law that solicitor-client privilege – the form of privilege that attaches to communications between lawyers and their clients for the purposes of providing legal advice – is a fundamental tenet of our legal system.

This form of privilege protects a client's ability to make fulsome disclosure in order to obtain legal advice, and recognizes the sanctity of the relationship between the lawyer and the client. In *Solosky v. The Queen*, the Supreme Court of Canada held that "[t]he right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client."[1]

In addition to the common law concept of privilege, lawyers are also bound by an ethical duty of confidentiality to their clients. For instance, in Ontario, section 3.3-1 of the *Rules of Professional Conduct* provides:

> "A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless
>
> (a) expressly or impliedly authorized by the client;
> (b) required by law or by order of a tribunal of competent jurisdiction to do so;
> (c) required to provide the information to the Law Society; or
> (d) otherwise permitted by rules 3.3-2 to 3.3-6."[2]

Solicitor-Client Privilege Survives Death

Solicitor-client privilege belongs to the client, and survives their retainer with their lawyer. Thus, while a current or former client is still alive, the application of privilege is fairly straightforward: unless the client waives privilege or an exception to the general rule applies, the lawyer should maintain confidence over the client's communications.

However, solicitor-client privilege also survives the death of the client. As a result, lawyers should be prepared to navigate the tricky legal and ethical issues that may arise when they receive a request for their records or their evidence, and a deceased client is no longer available to waive privilege.

---

[1] *Solosky v. The Queen*, [1980] 1 SCR 821 at 832.
[2] The Law Society of Upper Canada, *Rules of Professional Conduct*, s 3.3-1.

The "Wills Exception" to Solicitor-Client Privilege

After the death of a client, a solicitor who has custody of the deceased's Last Will and Testament may provide the Will to the deceased's personal representative. However, privilege still attaches to the communications between the solicitor and the deceased client.

The common law has recognized an exception to solicitor-client privilege, colloquially referred to as the "wills exception." The rationale behind the "wills exception" is to permit disclosure if it is necessary to protect the testamentary intentions of a deceased client.

For instance, where the validity of a Will is challenged, the disclosure of communications between the testator and the solicitor and the solicitor's evidence can help ascertain the testator's true testamentary intentions.

In *Geffen v. Goodman Estate*, a case dealing with the validity of a transfer to an *inter vivos* trust, Justice Wilson noted that "[t]he general policy which supports privileging such communications is not violated. The interests of the now deceased client are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what her true intentions were."[3]

Waiver of Privilege and Confidentiality After Death

The Supreme Court of Canada's decision in *Goodman Estate* served to extend the "wills exception" to allow for disclosure where there was a challenge to an *inter vivos* trust. However, it is important to note that the "wills exception" does not result in the waiver of privilege over all of the deceased client's legal files.

Courts have been reticent to extend the exception beyond the rationale of allowing for the determination of a testator's true intentions. For instance, in a recent decision, Justice Fish of the British Columbia Supreme Court refused to apply the "wills exception" where the production of the deceased's family law lawyer's file was sought in relation to a challenge to the validity of the cohabitation agreement between the deceased and his common-law spouse.[4]

Lawyers may receive requests for their records or their evidence in many matters that fall outside the purview of the "wills exception." For instance, in contentious estate proceedings, the parties may seek production from solicitors who provided advice on matrimonial, real estate or corporate issues. In non-contentious matters, the deceased's personal representative may request access to the deceased's legal files as part of the administration of the estate.

---

[3] *Geffen v. Goodman Estate*, [1991] 2 SCR 353 at 387.
[4] *Brown v. Terins Estate*, 2015 BCSC 775.

Generally speaking, lawyers are able to comply where a request for the deceased client's legal records is made by the estate trustee of the deceased's estate. In *Hicks Estate v. Hicks*, after carefully reviewing the jurisprudence, the Ontario District Court confirmed that privilege reposes in the personal representative of the deceased client, and that the personal representative "can waive privilege and call for disclosure of any material that the client, if living, would have been entitled to ..."[5]

Although the deceased client's personal representative steps into his or her shoes, lawyers may still wish to tread carefully when responding to such requests for their file. For example, where there is a risk that the authority of the estate trustee may be challenged, it would be prudent to ask for a court order authorizing the release of the deceased client's confidential information.

However, where it is clear that there is no current or anticipated challenge to the authority of the estate trustee, lawyers may respond to requests for disclosure from the estate trustee in the same manner that they would respond to such a request from the deceased client prior to his or her death.

The "wills exception" and the devolution of solicitor-client privilege to a deceased client's personal representative highlight some of the tricky issues that may arise after a client dies.

Lawyers should carefully consider any requests for their evidence or copies of their files. If there is uncertainty, it would be prudent to consult with a lawyer and obtain legal advice in order to ensure that complying with the request for disclosure would not result in a breach of the duties of confidentiality and privilege owed to the client.[6]

For more on this topic, please see Ian Hull's article, "Prior Wills and Testamentary Documents: 'Know When to Hold Them, Know When to Fold Them.'"[7]

---

[5] *Hicks Estate v. Hicks*, [1987] OJ No 1426, 1987 CarswellOnt 367.

[6] Lawyers in Ontario who receive a request for their Will file or for their evidence after the client's death should also contact and report such communications to LawPRO.

[7] Ian M. Hull, "Prior Wills and Testamentary Documents: 'Know When to Hold Them, Know When to Fold Them'" (1997), 16 ETR (2d) 94.

Toronto Law Journal

The *BMO* Case: Court Upholds Racist Will

Ian M. Hull & Suzana Popovic-Montag, Hull & Hull LLP

In its March 8, 2016 decision, the Court of Appeal for Ontario upheld a will that was motivated by racism. The decision in *Spence v BMO*, 2016 ONCA 196, is significant for estate law practitioners and people in Ontario who seek to bequeath property in a will because the Court defended the right of testators to be racist in the disposition of their property as long as they are not explicit about their racism in the testamentary instrument.

Factual and Procedural Background

In *BMO,* the testator, Rector Emanuel Spence, had a close relationship with his daughter, Verolin Spence, for nearly forty years. The testator had two daughters – Verolin, who lived with him, and his older daughter, Donna, who lived with his ex-wife. In 1979, Mr. Spence immigrated to Canada. After finishing secondary school, Verolin immigrated to Canada to join her father. Donna remained in the U.K. with her mother.

In Canada, Mr. Spence supported Verolin financially and emotionally. He covered tuition and living expenses for her while she completed three degree programs and one post-graduate certificate program. Between her studies, she lived with her father at his home. Furthermore, he welcomed her former boyfriends, who were of the same skin colour as himself, and he later comforted her when those relationships ended.

However, the relationship disintegrated when Verolin told her father that she was pregnant by a man of a different skin colour. Verolin, a black woman, had become pregnant by a white man. Mr. Spence rejected Verolin and her "bastard white son" and thereafter refused to associate with them.

Mr. Spence died on January 25, 2013. In his will, he explicitly disinherited Verolin and her 11-year old son. The basis for Verolin's disinheritance, the will stated, was because "she has had no communication with me for several years and has shown no interest in me as a father." The will directed that the entire estate be distributed to Donna and her two children. Notwithstanding Mr. Spence's stated reason for disinheriting Verolin and her son, Mr. Spence had no relationship with Donna or her two children, Kairo and Kailen. However, Kairo and Kailen's father was black.

Verolin brought an application to set aside Mr. Spence's will on the basis that it was void for public policy reasons. Relying on the uncontested affidavit evidence of both Verolin and Imogene Parchment – the Deceased's best friend and primary care-giver – the Superior Court of Justice held that the Deceased disinherited Verolin because of racist motives. The Deceased's racist motives offended public policy, and Gilmore, J, set aside the will.

However, the Court of Appeal for Ontario allowed the appeal, upholding the will of Mr. Spence.

The Court of Appeal's Decision

The Court of Appeal reversed the Superior Court decision for three basic reasons:

- The Court held, in essence, that the law permits people to discriminate on the basis of race as long as it is a private testamentary instrument.
- Relying on its own recent decision, the Court held that extrinsic evidence from a disinterested third-party was inadmissible.
- Absent explicit racism, the Court maintained that it has a narrow role in probate matters, which does not involve inquiring into a testator's motives. The court was concerned that consideration of evidence of motives might open a floodgate of litigation.

1. The Priority of Testamentary Freedom

The Court held that the principle of testamentary freedom, which says that a testator is generally free to dispose of their property as they choose, does not permit judicial intervention in private testamentary instruments where there are no explicit discriminatory conditions attached to the gift.

Verolin, the Respondent on Appeal, argued that courts will set aside a testamentary instrument – such as a will or a testamentary trust – if it is motivated by racism because racism offends public policy. The Court of Appeal distinguished between the authorities relied on by the Respondent on Appeal and the facts in *BMO,* reasoning that judicial intervention in testamentary instruments is limited to a testamentary instrument that is of a quasi-public nature. Cronk, JA, quoted from *Re Leonard Foundation*, saying, "it was the 'public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination.'" Cronk, JA, added, given that the *Human Rights Code* does not extend to testamentary dispositions of a private nature, "absent valid legislative provision to the contrary, the common law principle of testamentary freedom thus protects a testator's right to unconditionally dispose of her property and to choose her beneficiaries as she wishes, even on discriminatory grounds."

As such, there was no foundation for a public policy review of the testator's motives because of the unconditional and unequivocal bequest. Cronk, JA, reiterated, "Absent valid legislative provision to the contrary, or legally offensive conditional terms in the will itself, the desire to guard against a testator's unsavoury or distasteful testamentary dispositions cannot be allowed to overtake testamentary freedom."

2. Admissibility of Extrinsic Evidence

While the Court disposed of the appeal in *BMO* on the above analysis, the Court addressed the issue of the admissibility of extrinsic evidence because it was fully argued. The Court held that extrinsic evidence of *motive* from a disinterested third-party was inadmissible. As authority for this assertion, the Court relied on its recent decision in *Robinson Estate v Robinson*, which states that extrinsic evidence of *intention* is inadmissible.

In *Robinson,* the Court acknowledged two exceptions to the general rule that extrinsic evidence of intention is inadmissible – namely, "where a will is equivocal, that is, where the words used in the will may be read as applying equally to two or more persons or things" and "where the will is or may be ambiguous". In *BMO*, there was no equivocation or ambiguity; it was clear that the testator wanted to disinherit the one daughter with whom he had a close relationship.

The Court did acknowledge that intentions are distinct from motives. However, the Court stated that if extrinsic evidence of intention is inadmissible, then even more so extrinsic evidence of motive should be inadmissible because it would foster "unnecessary litigation" and lead "inevitably to confusion, uncertainty and indeterminacy in estates law."

3. Court's Role in Probate Matters

In concurring reasons, Lauwers, JA, added that voiding a private testamentary instrument on the basis of public policy would "greatly extend…the court's jurisdiction". The court's jurisdiction in private testamentary instruments is narrow because will-making "is a quintessentially private act of personal expression."

Extending the court's jurisdiction, Lauwers, JA, reasoned, would create a "slippery slope" that would allow courts to overturn private testamentary instruments on the basis of all forms of discrimination – not just racial discrimination. And this, he says, would "open the litigation floodgates" and thereby "greatly extend…the court's…burden".

Implications and Lingering Questions

Leave to appeal the *BMO* decision was refused by the Supreme Court of Canada. As such, the law in Canada appears to be that a testator is free to be racist in the disposition of their property as long as they are silent about their motives. In this sense, estates and trusts law is complicit in what Chief Justice Beverley McLachlin calls, the "passive tolerance of inequality"

While the decision of the Court of Appeal in *BMO* appears to definitively and explicitly condone private racism, certain questions remain, including the following:

- Is the public/private distinction really the standard for when courts will intervene in testamentary instruments?

- Even if the public/private distinction is the standard, what are the consequences of permitting private discrimination?

- With regard to the admissibility of evidence, what considerations are relevant in the context of a public policy analysis of racist motives?

- Assuming the considerations for intentions and motives are different, is the principled approach to hearsay available to provide an exception to the general rule with regard to the admissibility of extrinsic evidence?

- Finally, what is the court's jurisdiction in probate, given that probate confers *in rem* rights (ie, proprietary rights enforceable against third parties, rather than personal rights)?

1. The Public/Private Distinction

The assertion that courts are not permitted to intervene in private testamentary instruments is questionable. While the Court in *BMO* distinguished between *Fox v Fox Estate* and *McCorkill v McCorkill Estate,* both were private testamentary instruments in which the court intervened on the basis of discrimination that offended public policy.

Professor Bruce Ziff in an important publication (see annotation below) suggests the dividing line between public and private is arbitrary and unhelpful for the following reasons, amongst others:

- The public/private distinction is not a true reflection of the underlying rationale for court intervention. For example, if a family trust or will stated, "To only members of my family who are of the white race, Christian religion, British Nationals or of British Parentage", a court would not likely uphold such a disposition based on its clear discriminatory motives. An attempt to create permissible and impermissible discrimination by relying on a distinction between private and public obscures rather than clarifies the test for when a court can intervene in testamentary instruments. Indeed, the Court in *BMO* acknowledges that explicit racism might warrant judicial intervention, even in private testamentary instruments.

- All property rights are creations of law and recognized by the state. The exercise of property rights is a delegation of state power to the individual. As such, conferral of property rights engages the public.

- Members of a private family are, of course, also members of the public. No person or their particular friends or family exist outside of socio-political and socio-economic systems. Private life intersects with and impacts public life.

Professor Ziff further states that the distinction between public and private testamentary instruments is an arbitrary and unhelpful distinction that convolutes rather than clarifies the test for court intervention in testamentary instruments. Therefore, although the public/private distinction is that upon which the Court relied, it does not appear to reflect the standard that is actually applied for determining when a court will intervene in a testamentary instrument.

2. The Consequences of Permitting Private Discrimination

Canada has been at the forefront of anti-discrimination legislation. It exists in every province in Canada; is constitutionalized in the *Charter*; and is a stated concern of the global community – with Canada signing numerous international anti-discrimination instruments. And while these have done much to recognize the inherent dignity and worth of every individual, it is questionable whether improper discrimination has disappeared or has simply gone underground.

Furthermore, it could be argued that private discrimination can be more insidious than public discrimination. Indeed, the failure to address private discrimination is, what Chief Justice Beverley McLachlin calls, a "passive tolerance of inequality". She writes:

> Passive tolerance of inequality, while on the surface more benign than active discrimination, remains invidious. It either denies the existence of discrimination, or simply accepts it. Both denial and acceptance allow discrimination to continue and thereby reinforce the ethic of exclusion and subordination.

Because it is viewed as benign or outside of the reach of the court, private discrimination can therefore be more insidious. Furthermore, as it reinforces the exclusion and subordination of marginalized people, private discrimination threatens to exacerbate the socio-economic divide and promote inequality.

Permitting private discrimination on the basis that judicial intervention is limited to public discrimination arguably could be a "passive tolerance of inequality" that allows discrimination to continue and thereby deteriorates the efficacy of anti-discrimination legislation.

3. Relevant Considerations in Cases of Alleged Discrimination

While the Court of Appeal in *BMO* differentiated between motives and intentions, the Court applied the same rules to the question of motives as it did to the question of intentions. However, assuming courts can and do intervene in private testamentary instruments, one might ask whether the considerations involved in ascertaining motives are different from the considerations involved in ascertaining intentions.

Evidence of intentions ask, "*What* did the testator really want to happen with their property?" Evidence of motives ask, "*Why* did the testator want to dispose of their property

in this particular way?" Clearly, the goal of both questions is different, and if so, then the means to answering each question will likely be different. For example, if discrimination is systemic and lurking beneath the surface, as was posited in the previous subsection, then simply knowing what the testator really wanted to happen with their property will not be helpful in exposing discrimination. Indeed, in *BMO*, it was clear what the testator wanted, namely, to disinherit one daughter. What Verolin asked the Court to do was to look at why the testator chose such a peculiar dispositive scheme, given his formerly close and supportive relationship with her.

The point is that equivocation and ambiguity are not relevant considerations for ascertaining the testator's motives. And if courts are permitted to intervene in testamentary instruments because of discriminatory motives (which they are), then, arguably, the exceptions for admissibility of extrinsic evidence should be aligned with the goal, namely, ascertaining whether the testator's disposition was motivated by discrimination. Surely, the question with regard the admissibility of evidence in allegedly racist testamentary instruments is not whether there is ambiguity or equivocation in the document. Such a standard clarifies the testator's intentions; it does not help ascertain the testator's motives.

Furthermore, the *Robinson* decision, upon which the Court of Appeal relied, has garnered criticism at home and abroad. In Canada, Cullity, J, (who is nationally recognized as a highly regarded estates judge) said that the Court of Appeal missed the opportunity to clarify the difference between the types of evidence admissible in a court of probate and a court of construction. In the UK, courts can and do admit extrinsic evidence if it is relevant and reliable. As such, even if the exceptions to the admissibility of extrinsic evidence of intention and motive are the same as the Court contends (equivocation and ambiguity), one critic argues that the *BMO* decision may have conflated the court's jurisdiction (court of probate and court of construction) and created uncertainty about the proper rules of admissibility in each.

4. The Principled Approach to Hearsay

Another question left unanswered is the applicability of the principled approach to hearsay with regard to evidentiary issues in will challenges.

Extrinsic evidence, like hearsay, is evidence that is not furnished by the document but is derived from external sources. Thus, assuming that courts can intervene in private testamentary instruments, and assuming that the considerations that inform the rules of admissibility with regard to the question of motives are different than those regarding the question of intentions, then the rules regarding hearsay may be helpful in determining an appropriate standard for judicial intervention in allegedly racist wills.

Hearsay is generally inadmissible, but there are a few exceptions. However, even if a particular instance of hearsay does not fit one of those exceptions, it may be admissible based on a principled approach. The principled approach to hearsay states that evidence is

admissible if it is necessary and reliable.

(i) Extrinsic evidence of improper discrimination is usually necessary. As discussed earlier, discrimination lurks beneath the surface; and it will remain private when people make a will. Indeed, there is likely not a lawyer in the country who would draft a will with explicit, improper discriminatory provisions. Even in *McCorkill* (where a gift to an international hate organization was voided), the testator did not make his discrimination explicit. As such, while private, improper discrimination exists, it is not likely to be found on the face of testamentary instruments.

The only way to expose racism and other forms of discrimination is by reference to external sources, such as extrinsic evidence from third-parties with first-hand knowledge of a testator's private discriminatory motives. Extrinsic evidence is generally necessary.

(ii) Disinterested, third-party extrinsic evidence is usually reliable. Extrinsic evidence, particularly from a third-party who has nothing to gain from the litigation, is reliable evidence. However, extrinsic evidence from a disappointed beneficiary would generally be unreliable evidence. This is not a difficult distinction to recognize.

If the third-party proffering the evidence has a reason to fabricate or to be confused, then the extrinsic evidence should properly be inadmissible. But if the third-party is disinterested, then evidence based upon the third-party's first-hand knowledge that the testator was motivated by discrimination should be considered reliable and admissible based on a principled approach.

However, the Court did not consider the principled approach to hearsay and its significance for will challenges remains uncertain.

5. The Court's Jurisdiction in Probate Matters

On the same day the *BMO* decision was released, the Court of Appeal for Ontario also released its decision in *Neuberger v York*. Gillese, JA, in *Neuberger* emphasized the broad jurisdiction of the court's inquisitorial powers in probate matters. Relying on the decision of Cullity, J, in *Otis v Otis*, Gillese, JA, noted:

> The court's jurisdiction in probate is inquisitorial. That is, the court's role is not simply to adjudicate upon a dispute between parties. It is the court's function and obligation to ascertain and pronounce what documents constitute the testator's last will and are entitled to be admitted to probate. Further, the granting of probate does not bind only the parties in the proceeding. Unless and until probate is set aside, it operates *in rem* and can affect the rights of other persons.

In addressing the policy considerations which underlie the jurisdiction and the role of the court, Gillese, JA, further stated:

> A will, however, is more than a private document. As explained above, a dispute about a will's validity engages interests that go beyond those of the parties to the dispute and extend to the testator and the public. Once a testamentary instrument is probated, it speaks to society at large.

This view is in direct opposition to the comments in *BMO*. If it is accepted that there is indeed a public and inquisitorial role of the court, as described in *Neuberger*, then it is difficult to reconcile the decision in *BMO* to judicially sanction a racially motivated will.

Conclusion

While certain questions will need to be answered, at present, it appears that the law in Canada permits private discrimination so long as the testator does not make explicit racist statements in their will.