

# Foreword

Retired Supreme Court of Canada Justice, the Honorable Claire L’Heureux-Dubé, approached me at this year’s Quebec bar convention to say, “Ann, your Elder Law has really become something. I remember when you first introduced me to it and I questioned whether this was merely the marketing of general law to a particular clientele. And then you enlightened me.”

The year of that first meeting was 2002. Inspired and mentored by the Commission on Law and Aging (Commission) of the American Bar Association (ABA) the National Elder Section of the Canadian Bar Association (CBA) had just been born and with it an immediate recognition of a new area of practice and of law in Canada. The field of Elder Law or Law and Aging, as it was also known, began in earnest.

I explained to Maître L’Heureux-Dubé that from a practice perspective we were serving older adults and those playing important roles in the lives of older adults: legal representatives, family, and other professionals. We would develop a framework for examining and understanding the impact of aging on laws, policies and practices and in so doing take account of the socio-legal and medico-legal dimensions of an aging population.

I went on to explain that lawyers had not been at the table, nor were they part of any multidisciplinary bodies examining these important questions of the day. The legal aspects of aging formed no part of the study of gerontology, for example. As lawyers we were particularly equipped to defend legal rights and the important values of older adults: *dignity*, the freedom from age discrimination; *security*, including financial and workplace security, the promise of a health care system meeting their needs and protection from abuse and exploitation; and *autonomy*, the right to be treated as independent beings, even in the presence of diminished capacity.

From an academic standpoint there were many specific legal issues affecting older adults that would benefit from multi-dimensional and cross-disciplinary research to ensure that their rights were appropriately and respectfully addressed. Some areas of laws would be fairer and more effective if they reflected the issues of aging. Others would require that ageist and age-related references which perpetuated

judgments, policies, practices and views that excessively or unnecessarily restricted older people's rights and autonomy be reformed or expunged. Certain legal terms expressed outdated social concepts justifying paternalistic interventions.

Madame L'Heureux-Dubé went on to honor us with a "Special Note" in the first text on issues and concepts in Law and Aging in Canada, *Advising the Older Client*,<sup>1</sup> calling upon us to remember that we were a society for all ages. In our efforts to address the issues of aging we were not to set older persons apart in some new class. We were not to ghettoize them. I had taken that admonishment to heart throughout the development and proposal of the area and will carry her words with me always.

And her most recent comment at the bar convention, a generous compliment, of course, would stay with me as well. Yes, the field had really become "something". But what had we done and become? Were we moving fast enough and on all fronts? Where were we on our arc of entry into this field? Were we just beginning or in mid-course? Were our efforts merely fragmented or were they framed? When would our mission be accomplished? What directions were we taking? Would we necessarily recede into the fabric of general law once we had accomplished our professional teaching, research and advocacy on current law and aging issues?

We had, by no means, analyzed every law and policy, advocated every needed reform or ensured the respect and sensitive application in the practice of existing law but Canadian Elder Law had certainly come of age within the space of 10 years. National and provincial professional legal associations of the CBA had been established across Canada and in its territories within its first year and continuing education conferences on substantive law and professional practice subjects took to the national stage in 2003; research institutes on law and aging have existed in British Columbia and Quebec since 2003 and 2004, respectively. Courses in Elder Law and Law and Aging are now taught at several universities in faculties of law, social work and gerontology at the baccalaureate and Masters levels; the pioneering community legal aid clinic opened in 1985 to serve Toronto seniors, the Advocacy Center for the Elderly, has been followed by *pro bono* clinics in Quebec in 2007, in British Columbia in 2008 and at Queens University Faculty of Law, Kingston, Ontario in 2010 to provide research, direct client services, public education and advocacy within these provinces. Members of the National Elder Law Section work, on behalf of the CBA and in their own right, with provincial and federal governments on a myriad of issues of aging from health care, to end-of-life issues, abuse and exploitation legislation and policy strategies, uniform law development, financial literacy, housing and care options, pensions and benefits and informal caregiver benefits.

We had learned much from legal writers and academics in the United States and from the Commission, in particular. The Commission had opened in 1979 to research, educate and advocate the legal problems of older Americans and those serving them, particularly lawyers in the public sector. The ABA had taken an

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<sup>1</sup> Soden (2005).

unprecedented leadership role in addressing legal issues and professional practice in a multidisciplinary and integrated way and laid the foundation for the creation of the National Academy of Elder Law Attorneys (NAELA) which was established in 1988. Together with the ABA, NAELA developed a certification program for private practitioners serving older adults. Planning and eligibility for public medical services and long-term care benefits had given rise to vibrant, creative law practices, which first defined the multidisciplinary and holistic approaches of Elder Law.

It is hard to predict where Law and Aging and the practice of Elder Law will be in 10 or even 30 years in Canada, the United States and beyond. Specialized legal practitioners serving the legal and planning issues of older adults, advocating procedural fairness in the determination of incapacity, legal representation and other protective measures, and providing skilled approaches to prevention and resolution of family disputes and transitional issues in aging will continue to be in demand by an ever-expanding aging population.

The substantive law areas that many of these practitioners concentrate on within the Elder Law field vary from Wills and Estates Law, to Family Law and Health Law. There is also the holistic practice model of the Elder Law practitioner offering legal planning, later life and care planning and conflict resolution. This Elder Law practitioner touches on all of these related fields and others including such diverse areas as Housing (Real Estate) Law, Criminal Law, Tax Law, Labor Law and Administrative Law. Given their extensive skills set and understandings of medical and social issues new directions for the Elder Law practitioner beyond the practice of Elder Law include Disability Law, special needs trusts work as well as work for adult children of older clients who act as caregivers and legal representatives.

In time all practitioners in fields as diverse as Banking and Business Law will develop special knowledge and skills to sensitively deal with issues affecting their older clients. As practitioners become attuned to these issues the speculation is that we will move beyond Elder Law and that its identity will disappear into the landscape of general law.

Despite the substantial ground laid in the United States within private and public sectors of practice of Elder Law there is little evidence of any diminishing relevance of the field. The Commission reported on its thirtieth anniversary in 2009 that the field will, for the foreseeable future, continue to be “exciting and evolving for lawyers moved by goals of autonomy, dignity and quality of life for aging members of society. . . of any age.”<sup>2</sup>

Questions still arise as to whether Elder Law is more than a practice area. It is by no means universally recognized as a discrete area of law in either the United States or Canada. Many educators, researchers and advocates within the field, however, believe that it is, albeit difficult to define. Much like the field of International Law which examines international issues across various fields of law, Elder Law or Law and Aging examines law and practice through the lens of aging. Charlie Sabatino of

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<sup>2</sup> Bifocal (2009), at p. 109.

the Commission gave me the analogy of the field of geriatrics which touches on many specialty areas in medicine yet its practitioners understand how diseases and healing processes affect aging bodies differently than in younger people. In the same way Elder Law touches on many substantive areas but the interrelationships and dynamics of the substantive areas examined are particularly unique in the context of aging. We anticipate that recognition will continue to expand as the field further develops around the world. Elder Law is still emerging in Australia, Canada, Israel and Japan. The European Union and its Member State countries are at an earlier stage given their complex and extensive political, social and legal development in recent years.

Regardless of the advancement of recognition of this area of law there is certainly a role within the vast field of aging for analysis and advocacy of laws, policies and legal practices at local, national and international levels which promise to keep legal professionals busy for many years to come.

The practice of Elder Law and study of law and aging issues has led us in new directions beyond Elder Law. From a marketing and practice standpoint the field has injected new life into such fields of practice and of law as Family Law to examine divorce and remarriage in later life, reconstituted families, marriage and companion contracts in later life, tax, estate and care planning issues arising from separation, divorce and remarriage in May–December and December–December unions, filial obligations, grandparent access and adoption and informal caregiver legal issues. Our research on legal issues of aging has produced discoveries and led to cross-collaboration with other fields to develop enhanced legal understanding in other disciplines benefitting persons of all ages. Capacity, decision-making, and procedural fairness are but a few of the legal issues which have benefitted from partnerships and collaborations in research and advocacy in other fields.

Our practice and study of this interdisciplinary and multidimensional field has shown us how areas of law can no longer work in silos or in a piecemeal and fragmented way. One discipline informs another. The special issues of aging require timely answers, often crisis intervention involving the family and the need for efficient, sensitive solutions and preventative measures. These issues have encouraged creative problem-solving in lawyers. The successes born of new paths for problem-solving are giving a heightened relevance to the teaching of alternative dispute resolution in law schools and in continuing education courses across fields of law.

The years ahead will demand creative thinking. We are at a point in world history when the ways we learn, handle conflicts, pursue freedom, equality and security will change and creative problem-solvers will shape those changes. Canada's Chief Justice of its Supreme Court, the Honorable Beverley McLachlin,<sup>3</sup> has called upon lawyers to promote the law more as a framework for living together and less as a vehicle for dispute resolution. We will need people who can think in

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<sup>3</sup> *Supra* at Note 1, p. 10.

more than one way about solutions to these unprecedented issues facing an aging population and the greying of the globe.

Those in the forefront of the field are building and will continue to build bridges through comparative, trans-systemic and interdisciplinary thinking and analysis. This text is a contribution to that development. This collection of reflections, recommendations and reports by legal advocates on aging issues from Australia, Belgium, Canada, France, Israel, the United Kingdom and the United States is an opportunity for international exchanges of ideas and strategies in areas which transcend international borders and affect all older adults: decision-making capacity, surrogate decision-making, abuse and exploitation, discrimination, end-of-life issues and ethics and mediation in family matters.

In a previous book,<sup>4</sup> various scholars presented different theoretical approaches to Elder Law. In this book, the contributors attempted to further develop Elder Law knowledge and to point to new and futuristic directions in guardianship law from a substitute decision-making model to a supportive decision-making one, inspired by legislation from other jurisdictions in the world. New solutions for advancing the rights of older adults and addressing abuse and neglect advocate the application and development of principles of civil rights, human rights and citizenship. Discussion of the usefulness of a global approach to the promotion of rights through an international convention on the rights of older persons will also be explored. Overall, the book proposes new directions to the future development of Elder Law.

The passion to generously share and learn from each other is evident in the realization of this work and in the collaborations to follow which it and future efforts will inspire. These directions have taken us far beyond the early visions of the practice of Elder Law.

I would like to finish by thanking all the authors for their excellent contributions to this book, and to my co-editor, Dr. Israel (Issi) Doron, for partnering with me on this project. I would like also to thank Springer Publication and Dr. Brigitte Reschke, the Executive Editor in the field of law, for their support in publishing this book.

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<sup>4</sup> Doron (2010).



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