ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

DEADBEAT

Volume 28, No. 3
March/ Mars 2010

Trusts and Estates Section
Section des fiducies et successions

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Award of Excellence

The OBA's Trusts and Estates Section is pleased to announce that **Hilary Laidlaw** will be the recipient of this year's Award of Excellence in Trusts and Estates. Over the years, Ms. Laidlaw has demonstrated exemplary leadership through her knowledge, skill, passion and strength of character. Ms. Laidlaw's exceptional contributions and achievements will be celebrated at the End of Term Annual Awards Dinner (the date of which has yet to be finalized at the time of publication).

Breakfast Meeting with the Ombudsman for Banking Services and Investments and the CBA Elder Law Section Executive

The Canadian Bar Association's National Elder Law Section is having its annual in-person meeting on Friday, April 16, 2010 in Toronto at the Sheraton Centre Downtown. The day will kick-off with a free breakfast meeting with the executive, featuring a presentation and question and answer session with Douglas Melville, Ombudsman and CEO, Ombudsman for Banking Services and Investments (OBSI).

OBSI is the provider of dispute resolution services for most of the banking and investment sectors in Canada. Douglas Melville's presentation will focus on problems that arise between elderly consumers and their providers of financial services. Here is your opportunity to learn more about cost-effective solutions to client issues with financial institutions through use of the services of OBSI and to meet fellow elder law lawyers from across the country.

Breakfast is free, but space is limited! To book a spot, contact Rachel Watson at the Canadian Bar Association at rachellew@cba.org.

Henry and The Burden of Proof

*John O'Sullivan**

Be grateful for small mercies. That's what my grandmother used to say. And the decision of Newbould J. in *Henry v. Henry* [1] a year ago gives trust and estates practitioners a small mercy for which to be grateful.

All Deadbeat readers know by heart the eight principles of the burdens of proof in issues of testamentary capacity, undue influence and suspicious circumstances hewn by Cullity J. in *Scott v. Cousins*[2] from the Supreme Court of Canada's decision in *Vout v. Hay*.[3]

One of them may now have become simpler.
The seventh principle says this:

> 7. The existence of suspicious circumstances does not impose a higher standard of proof on the propounder of the will than the civil standard of proof on a balance of probabilities. *However the extent of the proof required is proportionate to the gravity of the suspicion.*[4] (emphasis added.)

The last sentence is based on Sopinka J.'s statement in Vout v. Hay that in applying the civil burden of proof on a balance of probabilities, the evidence must be "scrutinized in accordance with the gravity of the suspicion".[5]

Thirteen years after *Vout v. Hay* the Supreme Court of Canada rendered its decision in *F.H. v. McDougall*.[6] The case involved allegations of sexual abuse of a school boy by a school supervisor more than 30 years before the action was commenced. The trial judge concluded the plaintiff was a credible witness notwithstanding significant discrepancies in his evidence. The majority of the B.C. Court of Appeal allowed an appeal from findings of sexual assault because the trial judge did not scrutinize and accept the plaintiff's evidence in the manner required, and thereby erred in law.

In the Supreme Court of Canada, following a lengthy analysis of UK and Canadian jurisprudence on the standard of proof where the allegations made against a defendant are particularly grave, Rothstein J. wrote that to suggest that depending upon the seriousness the evidence in civil cases must be scrutinized with greater care, implies that in less serious cases the evidence need not be scrutinized with such care. He concluded:

> "In the result, I would affirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred." [7]

In *Henry v. Henry* Newbould J. had to decide whether a will was null and void by reason of the testator lacking testamentary capacity or by reason of undue influence. He cited the principle that the extent of the proof required is proportionate to the gravity of the suspicion as stated by Sopinka J. and summarized by Cullity J. in the seventh principle, and then concluded, "However this statement may no longer be good law as a result of the decision in *H (F) v. McDougall*."

Newbould J. specifically stated it was not necessary for him to decide this point, because his view of the evidence was the same regardless of the level of scrutiny.[8]

Newbould J's statement is in obiter but it does look like we may now be able to dispense with the last sentence of principle 7 in *Scott v. Cousins*.

Be grateful for small mercies.

**John O'Sullivan, Partner, WeirFoulds LLP*

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[1] (2009), 96 O.R. (3d) 437
[2] (2001), 37 E.T.R. (2d) 113 (S.C.J.)
[3] [1995] 2 S.C.R. 876
[4] (2001), 37 E.T.R. (2d) 113 (S.C.J.), at para. 39
[5] [1995] 2 S.C.R. 876 at para. 24
[6] (2008), 297 D.L.R. (4th) 193
[7] (2008), 297 D.L.R. (4th) 193 at para. 49
[8] (2009), 96 O.R. (3d) 437 at para. 39