HULL & HULL'S
ESTATE, TRUST AND CAPACITY LAW
BREAKFAST SERIES

"Discretion To Encroach: Do The Beneficiary's Personal Resources Matter"

"Guardianship of Minors"

"Should A Lawyer, Acting As Executor, Charge GST On Compensation"

SEPTEMBER 26, 2002

DISCRETION TO ENCROACH: DO THE BENEFICIARY'S PERSONAL RESOURCES MATTER?

Ian M. Hull

Introduction

An important aspect of advising your client with regard to the administration of an Estate is providing advice as to ongoing trust administration matters, in the context of the personal representative trustees' duties and responsibilities. Included in such advice, may be the need to consider the question of capital encroachments. In particular, dealing with the question as to whether or not the trustee has the power to encroach and if so what considerations need to be addressed when determining the quantum of the encroachment.

In considering this issue one should first look to the specific wording of the Will or Trust and consider the trustee's role in such a decision in the context of the language of the Will.[1] Typically, a testator's Will establishes trusts providing for the income to be received over the lifetime of the life tenant with the capital to be distributed on the death of the life tenant to capital beneficiaries. It is also typical to include in such trust arrangements the ability of the trustee to encroach upon the capital for the benefit of the life tenant.

A typical example of a wide power to encroach would be as follows:

---

[1] For a comprehensive review of the issue of Encroachments generally and that of Capital Encroachments, see *Fox v. Fox* E (1994), 5E.T.R. (2nd) 174, (Gen.Div.);reversed on other grounds (1996), 10 E.T.R. (2nd) 229, 28 O.R. (3rd) 496 (Ont. C.A.).

> ...to my said trustees to pay to my wife for the benefit of my said wife, such part or parts or the whole of the capital of the residue of my estate as, in the uncontrolled discretion, my said trustees consider advisable.

Does the Will Allow the Trustee to Encroach Upon Capital?

In interpreting the relevant provision of a Will, a Court must endeavor to give effect to the testator's intentions as ascertained from the express language of the Will and the surrounding circumstances. In Halsbury's Law of England, it is stated that the only principle of construction which is applicable without qualification to all Wills and overrides every other rule of construction is that the testator's intention is collected from a consideration of the whole Will, taken in connection with any evidence properly admissible, and the meaning of the Will and every part of it is determined according to that intention.

This has been commonly referred to as the "armchair" rule which allows the Court to take into account surrounding facts and circumstances when ascertaining and giving effect to a testator's intention.[2]

After having regard to all of the relevant factors and the tenor of the Will as a whole, the Court will then interpret the specific capital encroachment provision.[3] From a practical standpoint, if the language is unclear, then the executor should bring an Application for advice and direction to the Court to determine the extent of the power to encroach, generally.

---

[2] See *National Co. v. Fleury* (1965), 53 D.O.R. (2nd) 700 (S.C.C.) p.710.
[3] For a Comprehensive Review of the "armchair rule", see Feeney's Canadian Law of Wills at 11.43-11.79.

Even-Hand Principle

When considering the question of capital encroachments after reviewing the provisions of the Will, the executor/trustee must also have regard to his/her fiduciary duties. In particular, executors and trustees have a duty to act impartially as between beneficiaries.

Waters on the Law of Trusts in Canada[4], states the even-hand principle as follows:

> It is a primary duty upon trustees that, in all their dealings with trust affairs, they act in such a way that, if there are two or more beneficiaries, each beneficiary received exactly what the terms of the trust confer upon him and, otherwise, receives no advantage and suffers no burden which other beneficiaries do not share. In this way, the trustees act impartially; they hold an even-hand. The settlor or testator may choose to give disproportionate interests to various beneficiaries and he, very often, does so in practice, but that is his privilege. It is still the duty of the trustees to carry out the terms of the trust as they find them, and to ensure that, in the administration of the trust, they do not give advantage or impose burden when that advantage or burden is not so found in the terms of the trust.

The balanced and even-handed approach to the beneficiaries, income and capital, has been described by Waters at page 788 as follows:

> It is the distinction between income and capital that is so important in the context of this rule; there are two classes of beneficiaries, for income and capital beneficiaries are interested in different things. With regard to the trust fund, the income beneficiary is looking for the best yield obtainable, while, traditionally, the capital beneficiary is concerned with the safety of the fund ... it is the duty

[4] Second Edition at p. 787.

> of the trustees to manage the fund so that they do the best possible for both, and this means holding an even balance between yield and risk.

The requirement to uphold the even-hand rule is something that cannot be easily avoided and, certainly, even if the Will gives the executors the power to ignore this even-hand principle, there are always limits imposed by the Court.

As was stated by Maurice Cullity[5] (as he then was), there is a danger that a decision which seems to be reasonable when it was made will acquire a very different appearance when judged with the benefit of hindsight and this is something which all trustees must be aware of when considering exercising their discretion.

The author goes on to state that, however wide the terms in which a trustee's discretionary powers are conferred, the Court's discretion to fix the limits of the trustee's freedom of choice may appear to be far greater.

The Scope and Extent of the Power to Encroach

When considering this second stage of the analysis, namely, the scope and extent of an executor's power to encroach, the leading case in this area is *Gisborne v. Gisborne*.[6] Although not strictly speaking an "encroachment case", it dealt with the underlying issue of the scope of an executor's discretion, particularly, in circumstances where the beneficiary has resources of his own.

---

[5] Trustees' Duties, Powers and Discretion-Exercise of Discretionary Powers, Special Lectures of the Law Society of Upper Canada 1980 at pp.13-14.
[6] [1987]A.C. 300 (H.L.).

In *Gisborne v. Gisborne*, the Will provided for a trust fund for the care of the principle beneficiary, the trustees being allowed "uncontrolled authority" over the fund. The principle beneficiary had economic resources of her own; however, she was incapable and required full-time care.

The Court considered the whole question of the scope of an executor's power to encroach in such circumstances and, at page 305, stated the following:

> The trustee's discretion and authority always supposing that there is no *mala fides* with regard to which discretion is to be without any check or control from any superior tribunal.

The decision in *Gisborne v. Gisborne* was considered and confirmed by the Ontario Court of Appeal in *Fox v. Fox Estate*.

In *Fox v. Fox Estate*, the Court of Appeal emphasized the central limit on discretion as being a consideration of whether or not there exists in the mind of the executor an element of "*mala fides*"[7]:

> The entire question of the degree of control, which the Courts can and should exercise over a trustee who holds an absolute discretion, is filled with difficulty. The leading case, or at least the case to which reference is almost always made, is *Gisborne v. Gisborne*. It stands for the proposition that, so long as there is no "*mala fides*" on the part of the trustee, the exercise of an absolute discretion is to be without any check or control by the Courts.

[7] Galligan J. noted (at paragraph 11).

Does it Matter if a Beneficiary has Financial Resources of her Own?

Generally the only limit set out in the *Gisborne v. Gisborne* and *Fox v. Fox* is whether or not the executor displayed *mala fides* in the decision making process. Therefore, the question as to the extent of the beneficiary is personal resources should at first instance be irrelevant.

Having said that, the term *mala fides* itself can be broadly interpreted.

In *Fox v. Fox Estate* Galligan J. considered the concept of *mala fides* and emphasized the fact that the term should be interpreted with some flexibility and that *mala fides* itself is more than just a category of fraud, rather it includes any act by an executor which is based on "extraneous" matters namely, considerations which are in fact extraneous to the purposes of the testator as set out in the Will.

For example, Galligan J. in *Fox v. Fox Estate* concluded that the fact that her son intended to marry a gentile was entirely extraneous to the duty which she held as executor and this extraneous consideration demonstrated sufficient *mala fides* to bring her conduct within any reasonable interpretation of that term.

In coming to this conclusion, Galligan J. relied on *Hunter Estate v. Holton*.[8] In *Hunter Estate v. Holton*[9] Steele J. outlined the scope of a trustees discretion as follows:

---

[8] (1992), 7 O.R. (3rd) 372 (Ont.C.D.).
[9] ibid at p.379.

> "Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. Courts should be reluctant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in Re: Hastings - Bass ... as being applicable to the Courts review process of the exercise of such power."
>
> To sum up the preceding observations, in our judgment, where by the terms of a trustee ... a trustee is given a discretion as to some matter under which he acts in good faith, the courts should not interfere with his action notwithstanding that it does not have the full effect which he intended unless (1) what he has achieved is authorized by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.

It seems from a review of the cases that the overwhelming view is to allow for the broad exercise of discretion on an unfettered basis (presuming the Will or Trust provides for such) and that the Courts will only reluctantly limit that discretion.

For example, in Re: Luke[10] the Court considered a case where by the testator appointed his wife as executor and life tenant and the Will provided for her to use the income and so much of the corpus thereof as she may have need for her comfort, maintenance and support during her lifetime. The Court considered the question as to whether or not the wife should first use her own financial resources before she could exercise her power to encroach on the capital.

The Court held that the widow did not have to exhaust her own resources and stated:[11]

---

[10] [1939] O.W.N. 25.
[11] Ibid at p.29. See also Re: Mattick (1969), 62 D.L.R. (2nd) 539 at 543-4 (Co.Ct.), in Re: King, [1940] O.W.N. 57 (H.C.).

> Had the testator here intended that his widow should first exhaust her own funds before encroaching on the corpus of his estate he could have used appropriate language to express that intention. His failure to do so must surely indicate that her right of encroachment was an absolute right and not regulated by reference to other means of her own which she might have.

The Court again supported the principle that the surviving widow did not have to look to her own financial resources before she could enjoy the capital of encroachment.

In considering the exercise of discretion in the context of financial resources, the issue was dealt with directly in *Hinton v. Canada Permanent Trust Company.*[12] In this case the testatrix provided for a trust for her son and the executors were her son and a corporate trustee.

The Will provided that the executors were to encroach on the capital if the interest income proved "insufficient" for the son's support. For many years the executors paid the interest income to the son and an amount of a capital encroachment. Some years later, the corporate trustee requested that the son provide information as to his own resources to determine whether the encroachment was appropriate given the provisions of the Will. The son refused and the Court found that the lack of reference in the Will to the son's income as a factor in determining any capital encroachments, was intentional on the part of the testatrix and the son's personal resources were not relevant.

---

[12] (1979), 5E.T.R. 117 (H.R.), aff'd Ont. C.A., Feb 1980.

Recent Developments

In O'D*onnell* v. *Canada Trust*[1], the Court, in relying upon *Hinton* v. *Canada Permanent Trust Company*[2], found that the decision of the trustees to deny a capital encroachment based on the financial resources of the beneficiary was improper. The Court distinguished *Re McVean*[3] as well. The Court further confirmed the principle that, if a testator intended the trustees to have regard to the private means of a beneficiary, derived from sources outside the trust fund, the testator would have used appropriate language to express that intention.

Similarly, in *Re Atwell Estate*[4], the Court also agreed that there was no need for trustees to "factor in" other sources of income before exercising a power of encroachment and relied on *Re Hinton*.

The Court in *Paterson v. Paterson Estate*[5], a decision of the Manitoba Queen's Bench, came to a different conclusion. In that case, the Will provided for an uncontrolled discretion to encroach on income "to be used for the care of my mother...". The Court held that there was no positive duty on the trustees to encroach on income. The Court found that the testator intended to confer a broad and uncontrolled discretion as the trustee deemed advisable. The Court found that the trustee properly exercised her discretion, based partially on the mother's own income which was more than sufficient to meet her needs. The Court distinguished the

---

[1] (1996) O.J. 05-0026/95 Ferrier J. (Ont. S.C.).
[2] Supra.
[3] (1985), 51 O.R. (2d) 685 (Ont. H.C.J.).
[4] (1997), 19 E.T.R. (2d) 234 (Ont. Gen. Div.).
[5] (1996) 13 E.T.R. (2d) 86.

Hinton Case on the basis that the Court in that case held that it was a clear intention of the testator that the beneficiaries' private means should be disregarded. It also distinguished *Schipper v. Guarantee Trust Company*[6], an Ontario Court of Appeal case, where the Court held that the terms of the trust showed that the testator's intention, first and foremost, was to provide for the beneficiaries' care out of the trust fund, including capital. The Court in *Paterson* confirmed that once the Court ascertained the true intention of the testator, that intention ruled the day. It also reiterated that the Court will not lightly interfere with the exercise of discretion on behalf of the Executor.

In another case, *Re Passmore Knox United Church v. MacLeod*[7], a decision of the Alberta Court of Appeal, held that a Will which provided that the testator "did not anticipate it will be necessary to expend substantial amounts" because of the beneficiaries' "comfortable circumstances", was sufficient to require the trustees to consider the financial resources of a beneficiary. This is, obviously, easily distinguishable from Mr. Agro's Will.

In summary, therefore, it appears that *Hinton v. Canada Permanent Trust Company*, which stands for the proposition that, unless the testator specifically requires the trustee to consider the financial resources of the beneficiary, the trustees may ignore such factors in exercising their discretion, continues to be applied in Ontario.

---

[6] 33 E.T.R. 149 (Ont. C.A.).
[7] (1965) 49 D.L.R. (2d) 176 (Alta. C.A.).

In conclusion, a careful balancing act must be undertaken by an executor when administering a trust that includes broad power to encroach.

While the limits on the trustee appear to be focused on the question of *mala fides*, the principle that an executor may exercise his power to encroach, regardless of the financial resources of the beneficiary, of course has some limits. The limit that an executor must not encroach for "extraneous" purposes is a fundamental consideration.

GUARDIANSHIP OF MINORS

Paul Trudelle

Children are special, in so many ways. This is similarly so in the context of the administration of estates. Minors' interests in property require special considerations.

The objects of this paper are to highlight some of the special considerations that necessarily arise when dealing with the interests of children in the context of estate administration; to identify the relevant legislation; and to refer to the appropriate procedure or procedures that may apply.

DEFINITION OF MINOR

A person ceases to be a minor and enters the age of majority upon turning eighteen (18) years of age (*Age of Majority and Accountability Act*, s. 1(1))

In the absence of a definition or of an indication of a contrary intention, the definition of the age of majority applies for the construction of the expression "adult", "full age", "infant", "infancy", "minor", "minority" and similar expressions in any will or other instrument made on or after September 1, 1971. (*Age of Majority and Accountability Act*, s. 3 (1))

APPOINTMENT BY WILL

Legislation provides that a person entitled to custody of a child may appoint one or more persons to have custody of the child after the death of the appointer. Similarly, a person who is guardian of the property of a child may appoint one or

more persons to be guardians of the property of the child after the death of the appointer. (*Children's Law Reform Act* (hereinafter, "CLRA"), s. 61(1) and (2))

The appointment under the will is only effective if the appointer is the only person entitled to custody and/or guardianship on the day before the appointment becomes effective. In other words, the appointment is not effective if someone else has custody and/or guardianship at the time of death of the testatator (for example, the other spouse). (CLRA, s. 61(4))

The appointment contained in the will expires ninety days after the appointment becomes effective. It is assumed that an Application for custody and/or guardianship of the child's property will be made within that ninety day period. Where such an Application is launched, the appointment under the will is extended until the application is disposed of. (CLRA, s. 61(7))

CUSTODY AND GUARDIANSHIP CONTRASTED

Custody is a distinct concept from guardianship. Custody relates to the person. Guardianship relates to the property of the child. Parents of a child may have custody of the child, but are not guardians of the child's property unless declared as such by the court. The two offices may be held by one person.

APPLICATION FOR CUSTODY AND GUARDIANSHIP

i. Jurisdiction

In jurisdictions where there is a Family Court, the application must be commenced in that court. (*Courts of Justice Act*, s. 21.8) Otherwise, the application can be brought in the Superior Court of Justice, or the Ontario Court of Justice. In Toronto, the application is to be placed on the Estates List if it is brought in the Superior Court of Justice.

ii. Who may apply

Anyone may apply to be appointed guardian of property of the child, although a parent is given a statutory "preferential entitlement" to guardianship over a non-parent.(CLRA, s. 48(2)).

In determining a guardianship application, the court will consider "all the circumstances", including the following enumerated circumstances:

a. the ability of the applicant to manage the property of the child;

b. the merits of any plans proposed for the care and management of the property of the child; and

c. the views and preferences of the child, where such views and preferences can be reasonably ascertained. (CLRA, s. 49

The overriding concern, set out in s. 19 of the CLRA, is the best interests of the children.

A minor who is a parent may apply or respond to a custody, access or guardianship application brought under the Act (CLRA s. 63)

iii. Procedure

The Application is commenced by Notice of Application. An affidavit is filed in support.

Parties to the application must include the mother or father of the child, a person who has demonstrated a settled intention to treat the child as a child of his or her family, a person who had the actual care and upbringing of the child immediately

before the application, and "any other person whose presence ... is necessary to determine the matters in issue". (CLRA, s. 62(3)

The Notice of Application should be served on the Children's Lawyer.

In a guardianship application, a bond is generally required where the applicant is not the parent of the child.

In order to satisfy the court with respect to the criteria set out in the act, the applicant normally prepares a Management Plan. In addition, a net worth statement of the applicant is of assistance.

iv. Rights and Duties of the Guardian

Some of the rights and duties of the guardian of the property of the child are as follows:

(a) the guardian may be required to account or voluntarily pass his accounts in the same manner as a trustee under a will may be required to account or pass accounts in respect of his trusteeship (CLRA s. 52)

(b) the guardian must transfer all property to the child when he or she reaches the age of eighteen years (CLRA s. 53)

(c) a guardian who is not the child's parent is required to post a bond with or without sureties. Where in the opinion of the court it is appropriate not to require a bond, the need to post a bond may be waived (CLRA s. 55)

(d) the guardian may be removed or may resign from his office with the permission of the court in the same manner as a trustee, (CLRA s. 57) and

(e) the guardian is entitled to payment of a reasonable amount for his fees and expenses of management of the property of the child. (CLRA, s. 54; *Trustee Act*, s. 61)

APPOINTMENT AS ESTATE TRUSTEE

Where a minor is named as a sole executor in a will, the administration of the estate shall be granted to the guardian of the minor or to other such person as the Court thinks fit until the minor has attained the age of 18 years, at which time probate of the Will may be granted to the minor. (*Estates Act*, s. 26) This alternate estate trustee was formerly referred to as "*Administrator Durant Minore Aetate*". The Application is made by way of a Notice of Application to a Judge. An Affidavit in support of the Application is required. In addition, the consent of others who may be similarly entitled to apply for guardianship should be obtained and filed. The administrator appointed in the place of a minor will normally be required to post a bond.

Once the minor reaches 18 years of age, he or she may apply for a Certificate of Appointment as Succeeding an Estate Trustee, and the prior Certificate is then terminated.

PAYMENTS DUE TO MINORS

i. Legacies

A will may authorize payments of monies due to a child to his parent or guardian. Alternatively, the will may direct the personal representatives to establish a trust for a minor.

Where there is no guardian of property appointed, up to $10,000 can be paid to (a) the child, where the child has a legal obligation to support another, (b) the

parent of the child, or (c) the person who has lawful custody of the child. (CLRA, s. 51(1)) This section does not apply, however, where the money is payable under a judgment or order of the court. (CLRA s. 51(2))

If none of the above scenarios apply, the moneys must be paid into court to the credit of the minor, with notice to the Children's Lawyer

ii. Insurance Proceeds

Insurance proceeds payable to a minor must be paid into court, plus interest, to the credit of the minor. No Court Order is required. (Insurance Act, s. 220)

Alternatively, the insurer can pay the insurance proceeds, plus interest, to the guardian of property of the minor appointed under s. 47 of the CLRA, and may provide the insurer with a valid discharge. (*Insurance Act*, s. 220)

Where the amount in question is under $10,000, the insurer can pay the money to (a) the child, where the child has a legal obligation to support another, (b) the parent of the child, or (c) the person who has lawful custody of the child. (*Insurance Act*, s. 220)

If the deceased appointed an executor or trustee to receive insurance proceeds payable to a minor, then the executor or trustee can receive the funds. (*Insurance Act*, s. 193) This released the insurer, and transfers the problem of proper payment to the executor.

iii. Other Matters

Money found owing by a guardian to a minor on a passing of final accounts is to be paid into court. (*Trustee Act*, s. 36)

PAYMENT INTO AND OUT OF COURT: PROCEDURE

i. Payment INTO Court

Payment into Court is effected by sending the funds to the Accountant of the Superior Court of Justice, and delivering to the Accountant and the Children's Lawyer an affidavit setting out:

(a) a statement that the money is being paid into court under s. 36(6) of the *Trustee Act*;
(b) the facts entitling the child to the money;
(c) if the amount is different from the amount specified on the document providing for the payment, an explanation as to the difference;
(d) the child's date of birth;
(e) the full name and postal address of the minor, the parent(s), the person with lawful custody and the guardian for property.

ii. Payment OUT of Court

Where payment of funds has been made into Court on behalf of a minor, a Judge may order payment out of Court before the minor attains the age of majority. For smaller amounts necessary for the minor's care and upbringing, the person having custody of the minor may write to the Children's Lawyer, setting out relevant information to the request, including a financial statement completed by the caregiver. If approved, the Children's Lawyer will attend before a judge in chambers and obtain an order allowing for the payment out of court. This is known as the "fiat" list.

If the application is refused, a motion may be brought under Rule 72.03(10). Notice must be given to the Children's Lawyer. The material filed must demonstrate that the funds will be used for the direct benefit of the minor and

that the parent or guardian is unable to meet the identified needs of the minor without the funds.

Upon reaching the age of majority, the individual may obtain the funds held by the Court upon filing with the accountant a requisition for payment out, and an affidavit proving the identity of the party and that the party has obtained the age of majority (Rule 72.03(7))

GUARDIAN'S DEALINGS WITH PROPERTY

In order to dispose or encumber an interest of a minor in real property or personal property, or to make payment of money belonging to the child or income from property, the guardian or any other person including the parents or the child himself may apply to the court for an order requiring or approving the disposal, encumbrance, or payment. The Order will only be made if the court is of the opinion that the disposition, encumbrance, sale or payment is necessary or proper for the support or education of the child or will substantially benefit the child. Detailed material with respect to the proposed transaction is required.

See ss. 59-60 of the CLRA; and Rule 67 of the Rules of Civil Procedure ("Proceedings Concerning the Estates of Minors")

ACTIONS BY OR AGAINST MINORS

The Children's Lawyer shall act as litigation guardian where required to do so by an Act or the Rules of Civil Procedure. (*Courts of Justice Act*, s. 89(3)

Where a proceeding is against a minor in respect of the minor's interest in an estate, the Children's Lawyer shall act as litigation guardian of a minor defendant or respondent in a proceeding against the minor in respect of the minor's interest in an estate or trust unless the Court orders otherwise. (Rule 7.03(2))

Where the proceeding concerns an issue affecting a class of persons who are unborn or unascertained, the court may order that one or more persons represent such interests. (Rule 10.01(1)) The Children's Lawyer usually represents such interests, unless there is someone else available to do so.

Service of an originating process in respect of an estate or trust is affected upon a minor by serving the Children's Lawyer with a copy of the document that bears the name and address of the minor. (Rule 16.02(1)(j)) Such service upon the Children's Lawyer should be affected whenever there is a potential minor's interest in question, whether the minor is named as a party or not. Good practice requires that a covering letter accompany the document, setting out the minor(s) affected. The Children's Lawyer will decide on a case by case basis as to whether it will become actively involved in the proceeding.

Settlement of any action or claim involving a minor requires court approval in order to be binding on the minor: Rule 7.08(1) of the Rules of Civil Procedure. If such approval is not obtained, the minor, after attaining the age of majority, may sue to recover damages.

In variation of trust matters, court approval is also necessary where there are beneficiaries who are minors or unborn and unascertained issue or under some other disability at law. In such cases the court must be asked to approve the variation of the trust on their behalf. (*The Variation of Trusts Act*, s. 1(1)

Should a lawyer, acting as executor, charge GST on compensation?

David M. Smith of Hull & Hull Barristers & Solicitors*

- The introduction of the GST has resulted in more than a few questions regarding its applicability to particular services. The services performed by an executor are one such example.

Executor's compensation is taxable as income

- In the course of their practice, some (but not all) lawyers act as executors of estates and are entitled to compensation for so acting.

- Under the *Income Tax Act*, executor's compensation can be either **income from a business** or **income from an office** depending on the particular circumstances of the case. Either way, executor's compensation is taxable as income regardless of whether the executor is: (i) a layperson (income from an office), or (ii) lawyer or trust company (income from a business).

Are lawyers obliged to charge GST on executor's compensation?

- Lawyers, as purveyors of **commercial activities** as that term is defined under the Excise Tax Act ("ETA"), are registered for GST purposes.

- The ETA provides that the recipient of a **taxable supply** (eg. legal services) made in Canada by a GST registrant (eg. a lawyer in private practice) is required to pay GST on the consideration for the supply. The registrant

---

(eg. the lawyer) is required to collect the GST and remit it to the government.

- At first glance, the services (ie. **commercial activities producing a taxable supply**) generated by a lawyer's practice are expected to generate GST revenue for the Federal Government. The lawyer, in turn, is obliged to collect and remit the GST.

- If a lawyer acts as an executor in the course of running his/her business, he/she will be obliged to charge GST on his services.

- If a lawyer receives income as an executor, but his or her normal practice does not include acting as an executor and the service is provide on personal grounds (ie. to a deceased friend or relative), there is some doubt as to whether GST is properly chargeable on the services.

- The safe course of action for the lawyer acting as executor is always to charge GST as 7% of the compensation claimed, regardless of the circumstances.

- It is safe to say that a lawyer should expect to be scrutinized carefully with respect to any failure to declare GST on income received in the manner of executor's compensation. In such a case a ruling can be sought.