Toronto Law Journal

Pick your Poison: Supreme Court finds bank liable for third party employee's fraud

Kyle Kuepfer and Scott R. Venton, Fogler, Rubinoff LLP

The Supreme Court of Canada has clarified the limits of a major defence available to banks who face liability for processing fraudulent cheques. In *Teva Canada Ltd. v TD Canada Trust,*[1] the Supreme Court held that banks who accept fraudulent cheques are required to repay the innocent drawer unless the bank can prove (a) that the company did not actually intend for the payee to receive the cheque, or (b) that the payee was neither a legitimate creditor of the company nor an entity that the company could have reasonably mistaken for a legitimate creditor.

In *Teva*, the Supreme Court was tasked with deciding which innocent party, the company or the bank, should bear the losses resulting from the misconduct of the company's employee. The employee had fraudulently requisitioned cheques payable to entities with similar or identical names of the company's real creditors. As a result of the employee's scheme, the company issued the requisitioned cheques and mechanically applied the appropriate signatures. The employee opened several bank accounts under the names of the payees of the fraudulent cheques. Over the course of three years, the employee deposited 63 fraudulent cheques totalling $5,483,249.40. These funds were later transferred to the employee's personal accounts.[2]

Section 20(5) of the *Bills of Exchange Act*

The only issue to be decided in *Teva* was the applicability of section 20(5) of the *Bills of Exchange Act,*[3] which provides banks with a defence to claims for conversion.

In general, a bank is liable for the tort of conversion when it negotiates a cheque and makes the proceeds available to someone other than the person rightfully entitled to payment. Conversion is a strict liability tort, meaning that the bank will be liable even if it was diligent and acted in good faith, and regardless of any negligence or carelessness of the drawer company.

Section 20(5) provides that a bank can validly negotiate a cheque (and avoid liability for conversion) when the cheque is made out to a payee who is "fictitious or non-existent", which is often the case in situations involving fraud. In theory, section 20(5) aims to protect banks from fraud committed by a third party against the drawer, including an insider in the drawer

---

[1] 2017 SCC 51 ["***Teva***"].
[2] It is unclear whether the bank was able to recover any funds from the rogue employee.
[3] RSC 1985, c B-4.

organization. The section allocates the loss to the drawer, who is typically better positioned to detect and discover the fraud internally.[4] Through the use of internal accounting processes and authorization policies, companies should be able to prevent the issuance of cheques to entities it is not indebted to or does not intend to pay.

The Supreme Court's Decision

At the Ontario Court of Appeal, the Court held that section 20(5) afforded the bank with a valid defence. Accordingly, the company had to bear the cost of its employee's fraud. Writing for a unanimous court, Justice Laskin reasoned that the payees were fictitious because the company was unable to prove that it intended the payees to receive the proceeds of the cheques.[5]

The Supreme Court overturned the Court of Appeal's decision. Writing for a 5-4 majority, Justice Abella rendered a decision that prioritizes consistency of judicial interpretations within the bills of exchange context. Relying on the Supreme Court's prior decisions in *Boma Manufacturing Ltd. v CIBC*[6] and *Royal Bank of Canada v Concrete Column Clamps (1961) Ltd.,*[7] Justice Abella reiterated, in clear terms, the analysis required to determine whether a payee can be considered fictitious or non-existent under section 20(5).

For a payee to be fictitious, the drawer must lack a subjective intention to pay the payee. In these situations, the cheque is not intended to reflect the payment of a genuine pre-existing debt. Rather, the payee's name is inserted "by way of pretence only".[8] The drawer as a whole (and not just its rogue representative), must be subjectively aware that the cheque is being made out to a payee who the drawer does not intend to pay. Justice Abella concluded that in the absence of evidence to the contrary (i.e. an organizational intention that the cheque lacked commercial validity), the company's intention to pay the payee is presumed.[9]

If the bank cannot prove that the drawer did not subjectively intend to pay the payee, it may still rely on section 20(5) by demonstrating that the payee was non-existent. This is an objective analysis, which requires the bank to prove that the payee was neither (a) a legitimate creditor of the company, or (b) could not be reasonably mistaken for a payee with an established relationship with the drawer.[10] The idea behind this analysis is that drawers should be able to detect and prevent cheques from being made out to entities to whom it owes no debt.

In *Teva*, the bank was unable to prove that the payees were either fictitious or non-existent, despite the fact that the actual "payees" were merely creations of the fraudster employee who happened to share the same or similar names with legitimate creditors of the company. The

---

[4] *Rouge Valley Health System v TD Canada Trust*, 2012 ONCA 17 at para 11; *Bank of Nova Scotia v Toronto Dominion Bank* (2001), 145 OAC 106 (ONCA), at para 15.
[5] *Teva Canada Ltd. v Bank of Montreal*, 2016 ONCA 94, at para 87.
[6] [1996] 3 SCR 727.
[7] [1977] 2 SCR 456.
[8] *Teva*, *supra* note 1 at para 51.
[9] *Ibid*, at paras 52-53.
[10] *Ibid*, at para 56.

payees were not fictitious as the company's intention to issue cheques to the entities was presumed to be genuine. The bank did not present evidence to dispute this presumption. The payees were not considered non-existent because they could be reasonably mistaken as an entity with which the company had an established commercial relationship. As a result, section 20(5) did not provide a defence to the banks, who were liable for conversion.

Implications

Teva does not represent a major shift in the interpretation of the *Bills of Exchange Act*. Rather, *Teva* simply reiterates that the subjective intention of the drawer is a necessary consideration when apportioning liability for fraudulent cheques. Critics of this approach, including the dissenting justices, suggest that a focus on subjective intentions may cause uncertainty within Canada's bills of exchange system.[11] Absent a clear statement by the drawer that the impugned cheque was created to misrepresent the appearance of a genuine transaction, it is difficult to anticipate what evidence would satisfy the "fictitious" standard described by Justice Abella. On a few occasions, the dissenting justices commented on how cumbersome and impractical it would be to obtain such evidence.[12]

Nonetheless, the majority felt that, as the primary beneficiary of the bills of exchange system, banks should only escape liability for negotiating fraudulent cheques in a limited number of situations:

> *Banks are well-situated to handle the losses arising from fraudulent cheques, allowing those losses to be distributed among users, rather than by potentially bankrupting individuals or small businesses which are the victims of fraud.*
>
> …
>
> *If Parliament has concerns about the way this Court has balanced these complex policies, it is of course open to it to change the Act.*[13]

In a particularly divergent opinion, the four dissenting justices expressed a strong concern with this rationale:

> *[w]ith respect, it is contrary to public policy to make bank customers the insurers against fraud for companies that fail to exercise effective control over the actions of their employees. Those very bank customers may themselves be small businesses or individuals. Moreover, small businesses are "in an excellent position to detect the fraud at an early stage and in that way minimize the loss"*

---

[11] *Ibid*, at para 80.
[12] *Ibid*, at para 118.
[13] *Ibid*, at paras 67, 71.

> *… Encouraging them to do so is a more sound policy than asking bank customers to backstop sloppy management.*[14]

Regardless of the minority's unease, the majority decision in *Teva* confirms the difficult position that banks face with their customers. While cheque fraud can be limited through extra due diligence when opening accounts and through additional precautionary measures upon the receipt of cheques, these added safeguards are not certain to prevent fraud and may adversely affect customer relations. Although it may be possible for the banks to transfer liability for conversion to the drawer or drawee bank through creative contractual arrangements, these measures would likely be impractical from a business perspective.

The strict nature of liability for conversion combined with the Supreme Court's narrow application of section 20(5) make banks a target for companies who are victims of cheque fraud. While the extinction of paper-based payment systems may be on the horizon (and with it a reliance on more secure electronic systems), absent a legislative initiative to amend section 20(5), banks will continue to bear an increased risk related to third party cheque fraud for the foreseeable future.

[14] *Ibid*, at para 132. It is worth noting that many sophisticated companies are insured against cheque frauds committed by their employees. In situations where a bank was successful in defending a claim for conversion under section 20(5), it is likely that the losses would be distributed amongst the customers of the drawer's insurer in the form of increased premiums.

Toronto Law Journal

Amendments to the *Arthur Wishart Act (Franchise Disclosure) 2000* (the "*Wishart Act*")

David Kornhauser (MBA, LLB), Corporate Counsel MacDonald Sager Manis LLP, & Junaid Malik (BHRM, JD), Student at Law, MacDonald Sager Manis LLP

Ontario's Bill 154, the *Cutting Unnecessary Red Tape Act, 2017* (the "***Amending Act***") came into force on November 14, 2017. The *Amending Act* repeals various acts, enacts various other acts, and amends various acts including the *Wishart Act*.

The *Amending Act* provides for the following changes to the *Wishart Act*:

1) Subsection 5(1.1) provides that confidentiality agreements and location/territory reservation agreements are excluded from the *Wishart Act's* definition of "franchise agreement". The effect is that franchisors are now allowed to enter into confidentiality agreements and location/territory reservation agreements without triggering their section 5 disclosure obligation. This change is consistent with franchise legislation in other provincial jurisdictions, such as British Columbia.

2) Subsection 1(1)(a)(ii) amends the definition of "franchise" by only requiring that a franchisor or a franchisor's associate has a "right" to exercise control over, or offer significant assistance in, the franchisee's method of operation. The previous definition required that the franchisor exercise that right.

3) Subsection 2(3)5 of the *Wishart Act* contains an exemption from the application of the *Wishart Act* where the licensor grants a license to a single licensee. The *Amending Act* clarifies that the subsection 2(3)5 exemption must involve the grant of a nation-wide license in order for the licensor to rely upon the exemption.

4) Subsection 5(7)(b) contains an exemption to a franchisor's disclosure obligation where the franchise has been granted to a director or officer of the franchisor or of the franchisor's associate. The exemption now applies to the grant of a franchise to a person (being the director or officer) for the person's own account or to a corporation that the person controls if the person: (i) is a director or officer of the franchisor or of the franchisor's associate for at least six months, and still holds that title; or (ii) was once a director or officer as described in (i), and not more than four months have passed since they stopped acting in that capacity.

5) Subsection 5(7)(e) of the *Wishart Act* and the *General, O Regulation* 581/00 (the "***Regulation***") at *Part III* section 8 contains an exemption to a franchisor's disclosure obligation where the sales of the franchised business do not exceed 20% of the business' total sales. The *Amending Act* makes it clear that the sales for the first year of the

franchised business that were anticipated or that should have been anticipated, at the time the franchise agreement was signed, is the amount which will be compared against the business' total sales for that year for the purposes of qualifying for the exemption.

6) Subsection 5(7)(g)(i) of the *Wishart Act* and *Part III* section 9 of the *Regulations*, and 5(7)(h) of the *Wishart Act* and *Part III* section 10 of the *Regulations* contain exemptions to a franchisor's disclosure obligation where the franchisee spends less than $5,000.00, or more than $5,000,000.00, respectively, to acquire and operate the franchise. The *Amending Act* adds that each of these amounts are referred to as the "total initial investment" which is to be determined as prescribed under the *Regulation*. Although the basis for calculating the total initial investment is not prescribed by the *Regulation* at this time, it is anticipated that the *Regulation* will be amended to require that the total initial investment be calculated in the same way as the "franchisee's costs associated with establishing the franchise" pursuant to subsection 6(1)(i) of the *Regulations*.

7) Subsection 5(5) of the *Wishart Act* describes a franchisor's obligation to provide a written statement of material change. The contents of a statement of material change were undefined. The *Amending Act* requires that the contents of a statement of material change are to be prescribed by the *Regulation*. Although the *Regulation* does not currently prescribe the content of a statement of material change, we anticipate changes to the Regulation will be made to address this in the future.

8) Subsection 1(1) of the *Wishart Act* contained the term "service mark" in the definitions of "franchise" and "franchise agreement" as well, the term was used in subsections 2(3)4 and 2(3)5. The term "service mark" has been removed from the *Wishart Act* because it is an American trademark concept that is not used in Canada.

Although the import of these amendments do not significantly alter a franchisor's disclosure obligations in any meaningful way, they do bring some clarity to the items enumerated above.

Foreign bribery and Conspiracy: the Plot Thickens

Ken Jull, Gardiner Roberts LLP

I have previously written about the *Karigar* case in this Journal under the title of “Foreign Bribery and Conspiracy: A Plot that could be written in Hollywood”.[1] The Ontario Court of Appeal has affirmed the conviction of Karigar,[2] citing the Supreme Court of Canada’s comment on the significance of corruption in international business practices in *World Bank Group v. Wallace:*[3]

> Corruption is a significant obstacle to international development. It undermines confidence in public institutions, diverts funds from those who are in great need of financial support, and violates business integrity. Corruption often transcends borders. In order to tackle this global problem, worldwide cooperation is needed.[4]

In my previous article, I noted that a very unusual aspect of the case is that Mr. Karigar described the scheme in an e-mail sent under a pseudonym "Buddy" to the Fraud Section (FCPA) of the US Department of Justice stating he had information about US citizens paying bribes to foreign officers and inquired about reporting the matter. Mr. Karigar subsequently admitted that he is "Buddy". The statement, also cited by the Court of Appeal, described the scheme as follows:

> *There was a tender put out by Air India (Government of India enterprise) for a biometric security system, Cryptometrics bid on the system.*
>
> *Cryptometrics Paid USD 200,000 to make sure that only 2 companies were technically qualified.*
>
> *They paid $250,000 for the minister to 'bless' the system. There are documents executed to return the funds if the contract is not awarded. There are recordings asking for the money back.*
>
> *The People involved are Mr. Robert Barra, US citizen, CEO of Cryptometrics and Dario Berini, COO of Cryptometrics, also US Citizen.*
>
> *I am a Canadian Citizen on contract with the Canadian subsidiary of Cryptometrics.*
>
> *What about my immunity?*

---

[1] *Toronto Law Journal* February 2014.
[2] *R. v. Karigar*, 2017 ONCA 576
[3] *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207, at para. 1
[4] *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207, at para. 1, cited in *R. v. Karigar*, 2017 ONCA 576 at paragraph 39.

Justice Feldman for the Court of Appeal highlights some more salient facts of the case that underscore why this case could indeed be a Hollywood script. Karigar had approached Robert Bell, Vice-President, Business Development, for Cryptometrics Canada, with a business proposal. (Bell testified as an unindicted co-conspirator). Karigar said he was president of IPCON, a firm that had business dealings in India. Karigar explained he had good connections with certain Air India officials and advised that the airline was seeking technology to deal with security issues. The two discussed whether Cryptometrics's biometric facial recognition technology might provide a solution.

On February 24, 2006, Air India released its Request for Proposals to supply a biometric passenger identification security system. Crytometrics corporate officers met with Karigar and his colleagues in a hotel room in Mumbai to discuss submission of the Cryptometrics Canada bid. During this meeting, it was explained that Indian officials would have to be paid in order for Cryptometrics Canada to obtain the contract.

Cryptometrics officers developed financial spreadsheets that listed Air India officials who would be paid bribes and the amount of money and Cryptometrics's shares these officials would be offered. Karigar would subsequently admit in a statement to the RCMP that he furnished the information reflected in the spreadsheets.

The case also goes beyond the corruption field to encompass inside information and potential bid rigging. Karigar provided inside information regarding potential competitors for the contract. Later, under Karigar's direction and advice, the Cryptometrics team prepared a second proposal for the contract, using Karigar's company IPCON, creating the appearance of a separate competitive bidder using Cryptometrics Canada technology but at a higher price. This second proposal was designed to create the false impression of a competitive bidding situation, providing Cryptometrics Canada with certain procedural advantages.

Karigar e-mailed Bell requesting $200,000 for Air India's Deputy Director of Security. The $200,000 was subsequently transferred from Cryptometrics USA to Karigar's bank account in Mumbai. The trial judge found that this money was intended for the purpose of bribing the Deputy Director of Security.

Justice Feldman also cites a meeting with the Consulate General for Canada in Mumbai. The passage from the Appeal decision is worth repeating in full as it reflects an old style attitude that bribes were a standard cost of business:

> On May 15, 2007, the appellant and Berini met with Annie Dubé at the Consulate General for Canada in Mumbai. During the meeting, the appellant stated that Cryptometrics had paid a bribe to Praful Patel (Minister of Civil Aviation - India) through an agent in order to clear the process and obtain the Air India contract. The appellant also stated that their agent confirmed the bribe money had been received by Patel. The appellant did not disclose the identity of the agent, nor the amount of money that was paid. The appellant also talked about corruption in general in India and specifically how government figures would get up to eight

> percent of the value of a contract as a bribe payment. The appellant stated "but we know he received the money" and "you didn't hear that from us". He continued that "we went to an agent and he received something. And we got information from the agent that the Minister received it." Dubé testified that she was shocked and expressed that they could be prosecuted (or sued);[5]

Before considering the legal issues in this case, it is worth taking a step back to reflect about the potential impact of corruption. If this was a Hollywood script, here is where the drama would build. Air India flight 182 was flying over the Atlantic Ocean en route to New Delhi from Montreal via London on June 23, 1985 when it exploded in mid-air, killing all 329 people on board, including 22 crew members. The biometric passenger identification security system that Cryptometrics was bidding on would be part of the system to prevent future terrorist attacks. As the Supreme Court of Canada recognized, corruption undermines confidence in public institutions. Air India officials had a duty to ensure that their security systems would prevent future tragedies, and bribery undermines confidence in that process.

There were three key grounds of appeal in Karigar.

1) Territorial Jurisdiction

The offence was committed prior to the enactment of Bill S-14, which includes a new provision to establish territorial jurisdiction based on Canadian nationality or permanent residency of a person who has committed an offence under the Act.

The trial judge had observed that this new basis for jurisdiction was not retroactive and did not apply to the present case. He referred instead to the test for territorial jurisdiction stated by the Supreme Court in *Libman* that it is sufficient that there be a "real and substantial link" between an offence and Canada.

The Court of Appeal affirmed that there was a real and substantial link based on a myriad of factors, including the fact that a Canadian company was the proposed contracting party, the unfair advantage and fruits of the contract obtained through bribery would benefit that company and a great deal of the contract work was to be done in Canada.

2) The agreement to pay a bribe is not restricted to a direct bribe with the foreign official

Karigar submitted that giving the word "agree" its ordinary meaning, the *Corruption of Foreign Public Officials Act* (CFPOA) requires proof of an agreement between the accused and the foreign public official, and does not include an agreement between one or more other persons to offer a bribe to a foreign public official. This interpretation would have made offences much harder to prove, given the hidden nature of bribery. The Court of Appeal rejected this argument.

[5] *R. v. Karigar*, 2017 ONCA 576 at paragraph 17.

The centerpiece of the CFPOA,[6] section 3, states that the offence is committed when a person "directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official." The offence is clearly committed when a person agrees with a foreign public official to give that official a benefit. Justice Feldman writes that equally clearly, the offence is not limited to that scenario. "It includes both a direct ***and an indirect*** agreement to give or to offer an advantage. There is no limiting language on who must "agree", prescribing the parties to the agreement. It does not say that the agreement must be with the foreign official, only that the loan, reward, advantage or benefit that is the subject of the agreement must be a loan, reward, advantage or benefit *to* (or for the benefit of) a public official. On the language alone, there is no basis to read in a limitation on who must be parties to an agreement"[emphasis added].[7]

3) Co-conspirators' exception to the hearsay rule

The Court found no error in the trial judge's acceptance that Bell was an unindicted co-conspirator who could give in evidence against Karigar about the statements of other co-conspirators. Of course, his evidence as a witness recounting events from his own knowledge was not hearsay and was admissible as direct evidence.

Conclusion

The *Karigar* case ends with a Hollywood ending. It is also a message to the Canadian business community that anti-corruption compliance ought not to be relegated to the back row.

[6] For an expanded analysis, see Archibald, Jull and Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Thomson Reuters) chapter 17, "The Canadian Corruption of Foreign Public Officials Act: Mandatory Risk Assessment".
[7] *Karigar* at paragraph 43.

Toronto Law Journal

Considerations for LGBTQ Estate Planning

Suzana Popovic-Montag & Sayuri Kagami, Hull & Hull LLP

Introduction

While a preliminary step for any estate planner is to determine the marital and parental status of their client, it is important to recognize the difference in family structures one might encounter when assisting LGBTQ clients. Not only do these differences impact the type of estate planning that a practitioner might suggest, it should also serve as a reminder of the importance of fully informing clients of the differences in legal rights that they and their partner will experience as common-law spouses. Given the prevalence of common-law relationships and more unique parenting situations, particular issues are more pressing for LGBTQ individuals. There are important planning considerations for such individuals during their lifetimes, including potential incapacity and end of life planning.

Incapacity of LGBTQ Individuals

The laws providing who will be given priority in making financial and health care decisions for an incapable person vary jurisdiction by jurisdiction. Legal and biological family, such as spouses (sometimes including common-law partners), children and parents, will generally be favoured over other persons who may have a close, but legally unrecognized, relationship with the incapable person. For LGBTQ individuals who have dealt with difficult or non-accepting family members, having these people take over their finances and health care when they are at their most vulnerable is likely the last outcome that they would wish for. Even where an LGBTQ individual has a common-law (or even married) partner who may have first priority, other family members who refuse to accept the relationship may potentially seek court intervention to have themselves instead appointed to manage such decisions. Appointing persons by power of attorney for health care and power of attorney for finance can never fully reduce the risk of other family members disputing the attorney's appointment. However, such documents provide clear guidance to outsiders, including courts, as to whom an individual wished to have appointed to manage their affairs.

Particular Concerns for Transgender Individuals

Transgender individuals will likely wish to designate an attorney for their health care, not only to ensure that someone who is supportive of their gender identity manages these decisions, but to ensure that they will have a strong advocate for them when receiving medical care. In the United States, a survey by the National Centre for Transgender Equality and the National Gay and Lesbian Task Force of over 7,000 transgender individuals provided statistics as to the degree of discrimination faced by transgender individuals in obtaining medical care.[1] These statistics showed that 19% of respondents were refused medical care due to their transgender status, 28% of respondents experienced verbal harassment in medical settings, and 50% reported having to educate their medical care providers about transgender care. Given the ongoing barriers faced by transgender individuals in medical care settings, it is important for these individuals to choose the right people to take on the mantle of ensuring they receive proper and respectful medical care in the event of incapacity.

Providing for Children After Death

Ensuring that someone's children will be properly cared for after death is often a primary concern in that person's estate planning. For LGBTQ individuals, this planning can be complicated by the lack of recognition of unique family structures in the law. Many same-sex couples rely on assisted human reproduction in order to have families. This may include the use of egg donors, sperm donors, and surrogates with one of the members of the same-sex couple being the biological parent of the child and one not being biologically related. When relying on assisted reproduction, some parents may intend for the person who provided genetic material or acted as surrogate to also be a parent of the child.

In order to ensure that any children are properly provided for after death, wills that set out the property or share of the estate that each child is to receive should be created. As the family expands, individuals will need to revisit their wills in order to ensure that all children of the family are accounted for. For grandparents (or other relatives) of such children, care should also be taken as to how gifts are made in order to ensure that any gifts for grandchildren will encompass the children who may otherwise not fit the legal definition of "grandchild". Bequests to a person's "grandchildren" may still encompass persons treated like grandchildren, but not legally recognized as such as courts will look to the intention of the person at the time of the drafting of their will.[2] However, any uncertainty that may arise is better dealt with by additional precision in the drafting of the will. Where any uncertainty is not dealt with, undesired applications for a court's interpretation of the will may be required. A simple way of ensuring that a child is provided for, regardless of whether such a person may be legally recognized as a child, is to name the individual children being benefited in the will. Thus, rather than leaving an equal share of the estate to "my children" or "my grandchildren", names of the children being benefited would be provided.

Naming each individual child in a will may be problematic, however, where the family is expected to grow. This is particularly true for grandparents who may have many children and

[1] Jamie M. Grant et al, "National Transgender Discrimination Survey Report on Health and Health Care: Findings of a Study by the National Centre for Transgender Equality and the National Gay and Lesbian Task Force", Report, (National Center for Transgender Equality and National Gay and Lesbian Task Force: 2010), online: <http://www.thetaskforce.org/static_html/downloads/resources_and_tools/ntds_report_on_health.pdf>.

[2] See, for example, *Hickey v Greig,* [1987] WDFL 1544, 27 ETR 17 (ONSC (HCJ)), where the court found one step-child of a child to be a "grandchild" for the purpose of a bequest to "my grandchildren", while holding that the other step-child of the child was not a "grandchild" based on the testator's treatment of one of the step-children as his grandchild.

even more grandchildren. Regardless of the governing law as to when parent-child relationships are established, consideration should be given to providing a definition of "child" or "grandchild" where such terms are used in the will. By crafting the will with a definition of child or grandchild specific to the circumstances of the family, the testator can ensure that they benefit their children and grandchildren on their death.

While jurisdictions across Canada have grappled more and more with the changing views of family and the different ways in which children may be brought into a family, even provinces with the most progressive expansion of recognition of parentage do not fully encapsulate all parent-child relationships. For this reason, LGBT individuals should not rely on intestacy laws in providing for their children. Careful will planning should be undertaken which takes into account the unique needs and structure of the family.

Funeral and Memorial Planning

For transgender individuals, the potential for the erasure of their identity can be a grave concern. The potential for such erasure continues after death. Careful estate planning can mitigate such risks. At common law, the right to determine the manner and burial of a deceased lies with the executor of the deceased person's estate.[3] In order to ensure that unsupportive family members do not control the manner of burial after death, transgender individuals should carefully choose an executor for their estate. In addition to giving careful consideration to choosing the executor of an estate, transgender individuals should consider including provisions in their wills setting out their wishes as to the disposition of their remains and memorial planning.

Conclusion

There are important considerations for LGBTQ individuals to consider in their estate planning. Careful estate planning should be undertaken which takes into account the unique needs and structure of the family. By ensuring the proper safeguards are in place, LGBTQ individuals can rest easy knowing their wishes, and their loved ones, will be protected.

---

[3] Carmen S Theriault, ed, *Widdifield on Executor's and Trustees*, 6th ed, (Toronto: Carswell 2017), ch 1 at 1.1.