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# NEWSLETTER

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**Parole**– The word has two meanings in law, both derived from old Law French meaning “spoken word”. A prisoner who is released from custody because of his promise to abide by conditions, is said to be “on parole”. In court, evidence which is not documentary or demonstrative, but rather given from the mouth of a witness, is said to be “parole evidence”. The former is pronounced “pa-roll” and the latter “parrel”.

**Fee tail**– Nearly everyone knows that in Ontario, title to real estate is by way of *fee simple*. Few have ever heard of *fee tail*, but the latter was a common form of land ownership in older times. If you hold land in fee simple, you can sell or mortgage it as you wish, and in your will you can give it to anyone you choose. Not so with fee tail– you might be the owner and do as you wish upon the land, but you could not sell or otherwise alienate it, and upon your death it would have to pass to your heirs. If you had no heirs, it would revert to the grantor from whom you took title, or to his or her heirs.

While it may have been effective to keep land in the family, the device created nightmarish title situations and was abolished in Ontario in 1956.

Morality is doing what’s right regardless of what you’re told. Obedience is doing what you’re told regardless of what’s right. **Kurt Vonnegut**

**Ancient Welsh Law** provided that if a woman found her husband with another woman, he had to pay her 120 pence. If it occurred again, the payment was doubled. On the third occasion she could divorce him.

**Autrefois Acquit and Autrefois Convict** are “special pleas” which must be entered before the accused otherwise answers to the charge against him, so as to prevent double jeopardy. In simple terms, they deal with situations where the accused is able to say to the court, “I have already been tried for this offence, and I have been acquitted (or convicted, as the case may be) and I cannot be made to answer again”.

**Amicus Curiae**– Literally a “Friend of the Court”, an *amicus curiae* is a lawyer called upon by the court to

speak to certain issues which are otherwise not being addressed.

Such circumstances most frequently arise in the case of a self-represented party in a serious case who, because of his failure to understand the proceedings, is at risk of great injustice. In other cases, the court realizes that there are important issues of general legal significance which are not being addressed by other counsel and *amicus curiae* is appointed, by way of example, to assist the court with complex legal issues or dealing with expert evidence.

Be nice to your children– they will choose your rest home. **Phyllis Diller**

**Do you get paid for jury duty?**– Yes, but don’t give up your day job. If you are called and you live more than 40 kilometres from the court, you will get a travel allowance until you are selected, after which you only get the allowance if you live outside the city or town where the court is located. If you have to attend for more than ten days, you will receive \$40.00 per day, and after fifty days, the allowance increases to \$100.00 per day. The good news is that your employer can’t fire you. The bad news is that your employer is not obliged to continue your pay, or “top up” the daily attendance allowance.

**“Gotcha tactics”**– While these make for wonderful courtroom movies, they don’t happen much in real life, unless counsel opposite has been sleepwalking. Why? Because in Canadian courts, you can’t keep evidence up your sleeve. Parties are required by law to produce all of the evidence upon which they intend to rely, and to do so as soon as they are aware of it. Our Evidence Acts set time limits after which you are not allowed to produce evidence which has not been disclosed, unless you get leave of the court. Thus, even if you stumble upon “dynamite” evidence on the eve of trial, or even part way through, you can’t pull a Perry Mason. You need to convince a judge exactly why you did not share this with opposite counsel at an earlier date, and you are likely going to be faced with an adjournment and possibly costs.

**Costs in Estate Matters**– Estate fights used to be lawyers’ playgrounds because the beneficiaries could hire teams of counsel and fight for years, all at the cost of the estate. The joke used to run, “A pity to see all the money go to the beneficiaries!” With no personal risk, estate litigation could easily get out of hand. But no longer.

Recently a clear trend has developed that costs in estates matters will follow the usual rules, namely that the loser pays costs to the winner. And not out of the estate. If the litigation is largely driven because of defects in the will, costs may come out of the estate, but if the attacker is just trying to shake down the estate, the likelihood is that the court will fix him with “substantial indemnity” costs, meaning that he will have to pay nearly the full legal costs of the estate and everyone else he has troubled.

Children don’t listen to their parents, but they never fail to imitate them. **James Baldwin**

**The future of legal services**– As lawyers, we see more and more individuals “self-representing” in court, or looking for ways to save by preparing wills, contracts and other critical legal documents on their own. Generally, they don’t do well and simply get themselves into deeper trouble and create a bigger mess than the one in which they were originally. The cost of this fumbling to the system, to society and ultimately to themselves, is huge.

This crisis is well-known, well lamented and completely mis-diagnosed. But there is a larger and more significant crisis brewing which has not yet caught the attention of the media or the law societies. This is the impending disappearance of reasonably-priced, accessible legal services to large segments of Ontario’s public.

Lawyers who have laboured long in local communities are disappearing. They’re old and they’re tired. Retiring and not being replaced. No young person is interested in facing the risks and daily grind of running a solo practice for a net return far less than that of a teacher or a policeman. Better taking a job downtown doing interesting work for decent compensation, paying off student loans and raising a family. And who can blame them?

**Ontario moves to tighten up probate**– Effective January 1, 2013 the rules concerning the Estate Administration Tax (EAT) (formerly known as Probate

Fees) are being made much more stringent. Currently an “honour system”, tough investigative and enforcement provisions will be implemented.

As it is, the estate trustee is required to set out, under oath and risk of perjury, the value of the estate. Apparently that isn’t good enough. For reasons which have escaped everyone in the Estates Bar, the government has invoked all of the investigative and enforcement provisions of the *Retail Sales Tax Act* to enforce the collection of the EAT. If you recall, Ontario gave up Retail Sales Tax and joined the federal government in the Harmonized Sales Tax, and disbanded the RST collection force. Apparently a new collection army will be recruited so as to ensure scoff-laws don’t cheat Ontario out of the existing 1.5% tax.

Of considerable concern to the Estates Bar is the lack of any provision for a Clearance Certificate. With the feds, once you’ve paid all taxes for the estate, you can (and should) receive a certificate which allows you to close the file without having forever to look over your shoulder. Unfortunately, no such provision exists under the Ontario scheme. The executor will never rest easy, no matter how carefully the value of the estate was calculated.

**Range of Services**– One of the many benefits of the larger law firm is that clients get “one-stop shopping”. All under one roof, we can provide strength in litigation, family law, sophisticated corporate & commercial transactions, franchise law, estate planning & administration, and all manner of real estate law. With the exception of a few esoteric areas, the chances are we have someone with strength and experience in the field of your legal need, as well as the capacity to serve you in English, French, Spanish or Greek.

Live as if you were to die tomorrow. Learn as if you were to live forever. **Mahatma Gandhi**

**Family Trusts**– There can be some real advantages to holding shares of a small business corporation in a family trust. These include an ability to sprinkle income amongst lower tax bracket individuals, to benefit family members without risk of claims by creditors or spouses and ultimately to multiply the lifetime capital gains exemption. While one shouldn’t forget about the initial set-up cost and ongoing overhead of annual returns, if this might work for you, give us a call or have your accountant get in touch with us.