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Chief Justice Beverley McLachlin speaks at the CBA conference in Calgary; see extensive coverage of the conference in this issue. Photo by Jared Adams/Canadian Bar Association

Secret same-sex lover loses claim for spousal rights

By Arnold Ceballos
Toronto

A British Columbia court has rejected a man's claim to be a common-law spouse of his late closeted male lover.

Reza Chowdhury had sued the estate of Peter Argenti seeking a share of his former lover's home, as well as claiming entitlement to an interest in his estate as his surviving spouse.

Chowdhury had met Argenti in Vancouver in 1990 and they carried on a sexual relationship for many years after that. Argenti was married until 1993 and had three daughters. The court noted that "Mr. Argenti's family and friends were stunned by the realization that he had been a closet homosexual. For 66 years, he had portrayed himself as a heterosexual man, a "macho" longshoreman, and a member of the Italian Catholic community."

According to the court, Chowdhury lived in Argenti's house between 1993 and 1996 and, as a cover for the relationship, the men opened a restaurant together. Eventually, the restaurant closed and Argenti made Chowdhury move out of the house and into a small apartment that Argenti paid for. They continued to see each other after 1996, although the court noted that their relationship appears not to have been exclusive from Argenti's perspective. Argenti died in 2003, leaving his entire estate to one of his daughters,

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Judges want to take politics out of pay

By Cristin Schmitz
Calgary

Canada's federally appointed judges say they will push for a new law to keep their compensation from being turned into a political football in Parliament.

The past president of the Canadian Superior Courts Judges Association, Northwest Territories Supreme Court Justice John Vertes, confirmed in an exclusive interview at the group's annual meeting in Calgary Aug. 12 that his members want the Harper government to make changes to the *Judges Act*.

Ideally, those amendments would effectively bind present and future governments to introduce and enact legislation within specified time limits, in response to recommendations made to the Minister of Justice by an independent judicial pay and benefits commission that must be struck every four years, explained Justice Vertes, whose association represents the vast majority of 1,000 federal trial and appellate judges.

He told *The Lawyers Weekly* the group is also considering asking the government to abbreviate the six-month time period that the justice minister now has, under the *Judges Act,* to respond publicly to the report of the "quadrennial" commission.

"We are proposing, perhaps, to shorten the time line for the minister's reply, perhaps introducing timelines for the introduction of legislation, and the consideration of legislation by [Parliamentary] committee," said Justice Vertes. "That alone, I think, would help to move things along quite a bit because our concern, and I think it is one shared with government,... no matter what political stripe,... is to [not] have these sort of issues sitting around for lengthy periods of time, with the prospect of that becoming politicized."

Parliament took two-and-a-half years to enact a retroactive salary increase for the judges, after the most recent quadrennial commission report in May 2004. That is too slow, leading to one quadrennial commission nearly bumping up against the next, Justice Vertes said.

"The very fact that it takes so long has resulted in this quadrennial commission process becoming almost an ongoing permanent process [which] it was never meant to be," he said. "It was meant to be efficient. It was meant to be, as it says, 'quadrennial' – which means every four years – *not* four years continuously. So that's one of our concerns and we have proposed to the minister that it's time to take a closer look at the implementation phase [for the commission's recommendations]. Our concerns are not with the qua-

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COMMENTARY: don't conscript lawyers to this war

By Terrance Carter and Sean Carter

The federal government's draft regulations on terrorist financing and money laundering are poised to send shockwaves throughout the legal community and significantly alter the dynamics of the lawyer-client relationship, if adopted in their current form. These regulations would require a major overhaul of lawyers' day-to-day operations since even the suspicion of a contravention could lead to an investigation and cripple a practice for months or even years.

The federal government is determined to see the legal profession brought under the purview of the "Regulations Amending Certain Regulations Made Under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (2007-2)" released by the Department of Finance on June 30, 2007. The Department of Finance was clear in its "Regulatory Impact Analysis Statement" that accompanied the publication of the regulations that the legal profession is one of the final sectors that it intends to bring within the reach of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, thus "closing the gaps" in Canada's anti-terrorist financing regime. The draft regulations are only subject to a 60-day consultation period, which comes to a close on Aug. 29, under-

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Traditional defenses and protections have fallen by the wayside

LAUNDERING
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scoring the government's sense of urgency.

Because the legal profession is statutorily protected from reporting requirements, the draft regulations creatively propose lawyers meet everything *but* the reporting requirements (i.e the client identification and record-keeping requirements). The responsibilities of lawyers and law firms under the vaguely worded draft regulations are presumably triggered when counsel is involved in a variety of routine activities, including the purchase or sale of property, receiving or dispersing of judgments and/or settlement funds, or the administration of estates.

Enforcement and penalties under the regulations range from requiring lawyers to complete questionnaires, be subjected to on-site investigations by FINTRAC (the agency which monitors compliance) and pay financial penalties of up to $500,000. These penalties and investigations under the *Proceeds of Crime Act* are substantial and of concern in and of themselves, since they essentially allow for the oversight of a government agency in a lawyer's internal compliance procedures. However, these penalties are just the tip of the iceberg with regards to potential liability for legal counsel.

The interagency information-sharing regime in Canada, which has been bolstered to unprecedented levels since the fall of 2001, allows for information or suspicions raised by FINTRAC to be shared with the RCMP and CRA. This is how a suspicious transaction, or a lawyer's failure to implement required due diligence, investigated by FINTRAC under the draft regulations, can lead directly to investigations of the lawyer under terrorism provisions of the *Criminal Code* by law enforcement agencies. Even if the lawyer is eventually cleared of any wrongdoing, such an investigation could trigger the sweeping *Criminal Code* terrorism provisions allowing for the freezing and seizure of assets, which, from a practical standpoint, could shut down their practice for an indefinite period of time.

"The legal profession should not 'go gently' and allow itself to be blindly conscripted into the 'war on terrorism' without serious consideration concerning the ramifications for the profession and for our clients."

If adopted, the draft regulations would have significant implications for how lawyers and law firms conduct their practices. The immediate practical implications of the draft regulations include: conducting a firm-wide risk assessment as to the "vulnerabilities" to be used in terrorist financing; developing and embedding anti-terrorism policies into day-to-day activities of lawyers and staff; rigorous client identification confirmation procedures and specialized record keeping; and preparation for potential on-site investigations by FINTRAC.

Even without the adoption of the draft regulations, legal counsel and their clients are already subject to scrutiny under the *Proceeds of Crime Act.* Under the *Act*, all financial institutions that actually process and carry out any monetary transactions are already responsible to report certain transactions to FINTRAC, confirming the identities of the parties and analyzing the transaction for any signs of activity that would raise suspicions about terrorist financing. The issue in dispute is not whether there is a need to curb the financing of criminal activities, but rather who is conscripted to carry the efforts out and the manner in which it is done.

There is an already significant anti-terrorism due diligence burden placed on lawyers under anti-terrorism legislation separate from *Proceeds of Crime Act*, and lawyers and law firms will now be facing an ever invasive and burgeoning liability in an area of law where traditional defenses and protections have fallen by the wayside in the name of national security. Being directly subject to regulation under anti-terrorism laws leaves one vulnerable to a myriad of harsh and arbitrary measures unparalleled in almost any other area of law.

The legal profession should not "go gently" and allow itself to be blindly conscripted into the "war on terrorism" without serious consideration concerning the ramifications for the profession and for our clients. However, given the urgency and priority the federal government has given to its latest initiative to bring the legal profession under the purview of anti-terrorism laws, the profession may have run out of time.

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Terrance Carter

Sean Carter

Implied waiver does not preclude appeal

JDR
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Further, the dissent stated that where a litigant has concerns that there may be a reasonable apprehension of bias, it is not acceptable "to await the results of the trial and then, if unhappy with the result, raise the issue for the first time on appeal... [this] permits an abuse of the court's process and results in a waste of scarce court resources." In this case, Justice McFadyen stated it is "contrary to public policy and constitute[s] an injustice to the respondent to permit the appellant to raise reasonable apprehension of bias for the first time on appeal."

Matia Matkovic

The majority, however, stated that without express, informed consent, even in the circumstances of this case, where the appellant had ample opportunity to raise concerns regarding the reasonable apprehension of bias prior to the conclusion of the trial, a new trial would be ordered. Justice Berger specifically addressed judges, litigants and their counsel in the decision, stating that an implied waiver of apprehension of bias does not "immunize the trial verdict from appellate intervention."

Co-counsel retained for the appeal, Ronald Foster, stated "Obviously, in a perfect world this issue should have been raised earlier." However, Foster states that the decision "increases the standard" by providing "an extra layer of protection" to litigants who proceed from JDR to trial.

These new rules are also intended to protect the judiciary. Justice Berger confirmed this by stating "It is essential that JDR judges be immunized from allegations of lack of impartiality..."

Co-counsel for the appellant, Matia Matkovic, said that the case establishes that "even if parties have counsel, we have a duty to ensure that the public remains confident that we have an impartial judiciary. Not only that justice be done, but that it seen to be done."