

LAWEN ESTATE AT THE COURT OF APPEAL

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It had appeared that the 2019 Nova Scotia Supreme Court case of *Lawen Estate v. Nova Scotia (Attorney General)*, 2019 NSSC 162, was the first case in Canada to extend constitutional protection to the testamentary decisions of a deceased person. However, a recent Nova Scotia Court of Appeal decision has overturned this decision.

Jack Lawen made a will in 2009 that treated his four adult children differently: he chose to leave \$50,000 each to two of his three daughters; nothing to his third daughter; and the rest of his estate to his son, Michael Lawen. After Jack Lawen's death in 2016, his three daughters started an action under Nova Scotia's dependants' relief legislation, the *Testators' Family Maintenance Act* (TFMA), asserting that his will did not make adequate provision for them.

Nova Scotia is one of the few provinces that allows non-dependent adult children to challenge a will; a testator's moral obligation to dependants means that an applicant does not need to show actual dependency on the testator to make a claim under the TFMA, as long as the applicant falls within the legislation's definition of a "dependant." Michael Lawen and the executor of Jack Lawen's estate (Joseph Lawen, a brother of Jack Lawen) were granted public interest standing in order to bring a separate application asserting that certain provisions of the TFMA violated sections 2(a) (freedom of conscience and religion) and section 7 (the right to life, liberty, and the

security of the person) of the *Canadian Charter of Rights and Freedoms*.

At issue in the application were two provisions of the TFMA: section 2(b), which defines a "dependant" as "the widow or widower or the child of a testator," and section 3(1), which allows a judge to make an order for adequate maintenance and support if a testator has not "made adequate provision in his will for the proper maintenance and support of the dependant."

The trial judge in the Supreme Court of Nova Scotia, Justice Bodurtha, found that the benefits of allowing claims by non-dependent adult children under the TFMA did not outweigh the infringement on a testator's freedom to dispose of his or her estate without

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constraint. Justice Bodurtha found at paragraph 8 that a "testamentary decision is a fundamental personal decision that is protected under section 7" on the basis of the testator's liberty interest, and that the violation of section 7 could not be justified under section 1 of the Charter. However, he did not find that the testator's freedom of conscience, protected by section 2(a) of the Charter, had been violated. Justice Bodurtha applied section 52 of *The Constitution Act, 1982* to read down the definition of "dependant" in the TFMA to exclude the moral claims of non-dependent adult children. The province of Nova Scotia appealed the trial decision.

The appeal was heard on February 4, 2021, and written reasons were released on May 19, 2021. The Nova Scotia Court of Appeal allowed the appeal by the attorney general of Nova Scotia and upheld the constitutionality of the two TFMA provisions at issue in *Nova Scotia (Attorney General) v. Lawen Estate*, 2021 NSCA 39.

In allowing the appeal, Justice Farrar, writing on behalf of the Court of Appeal, found that sections 2(b) and 3(1) of the TFMA do not infringe the Charter rights protected under sections 7 and 2(a). The court confirmed that claims involving the Charter cannot be decided in a vacuum. No evidence was presented at trial that would have allowed the trial judge to determine whether the testator's liberty interests were engaged, and had they been engaged, whether they accorded with the fundamental principles of justice. Because the respondents inferred that a breach of the testator's liberty interests arose on the basis of the possibility of a variation of the will after death, the Court of Appeal held that there was an insufficient evidentiary basis to support the finding of an infringement of section 7. The court also agreed with the trial judge that there was no infringement of the testator's freedom of conscience under section 2(a). It ordered the costs of the action to be paid personally by the respondents, rather than the estate, after finding no substantial merit in the public interest litigation.

An application for leave to appeal to the Supreme Court of Canada has been filed by Michael Lawen.

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