



The boomer challenge: Are lawyers ready?

Last year – 2006 – was a milestone year for more than 10 million Canadians. It was the year in which the leading edge of the baby boom generation hit 60 years of age.

Following close on the heels of those early boomers is a tidal wave that has re-invented every stage of life from birth on – and now is about to redefine what it means to live “the golden years.”

Like all others, the legal profession will inevitably be swept up in this wave, not only because many lawyers themselves are boomers, but because this huge, retiring cohort is destined to leave its mark on lawyers and law practice.

A brief explanation of the numbers and the people behind the numbers is a wakeup call to anyone providing legal services.

The facts: Canada is aging

There is little doubt that grey power is in its ascendancy.

Back in 1921, five per cent of people living in Canada (one in 20) were over 65 years of age. By 2006, that percentage had more than doubled to 13 per cent, and by 2026 Statistics Canada projects more than 20 per cent – one in every five people – will be over the age of 65.

What's driving this increase? Boomers. About 10 million Canadians – nearly one-third of our current population of 33 million, qualify as “baby boomers” born between 1947 and 1966. About 1,000 of them turn 60 every day. By 2031, all boomers who are still alive will be senior citizens.

Not only are boomers the single largest cohort ever, they're also the healthiest and longest living. Boomers' parents, for example, had a life expectancy of about 60 whereas their offspring can expect to live well into their late 70s and early 80s.

But numbers tell only part of the story. Equally important are the characteristics and likely behaviour of the group, says Canadian demographer and University of Toronto professor David K. Foot in his book *Boom, Bust & Echo 2000*.

What makes boomers unique? They are generally well-educated, worldly, and financially comfortable (if not affluent). Because of

their numbers, they have been catered to at each step in their childhood and adulthood, and will expect no less in their senior years. They are demanding, sophisticated purchasers – and as they hit their middle 50s, they'll increasingly become buyers of services in areas such as healthcare and wealth management. Moreover, their service expectations are high: With them, a cookie cutter approach does not cut it.

Wealth management – and related estate planning issues – are a major preoccupation for today's boomers, not only because they are the beneficiaries of likely the single largest wealth transfer ever in Canadian history⁽¹⁾ (thanks to their parents who reaped the financial rewards of a booming economy driven by the boomer generation), but also because they themselves are now squarely in the "saver group". Many own real estate, often mortgage-free, are out of the spending years (associated with raising children) and into their investing years. But at the same time, boomers are confronting the dual realities of longer life expectancies and higher lifestyle expectations – driving a demand for business succession planning, estate planning and wealth management services.

Not to be ignored are the Depression babies – the "golden group of Canadian society" as David Foot calls them. They entered the workforce when the Canadian economy was booming, they benefited from the rise in real estate and stock markets, and ended up with lots of disposable cash. According to Foot: "Parents of boomers are the richest group in Canada – and they are tough customers."⁽²⁾

Boomers and the bar

Lawyers ignore these new realities at their peril. Demand for legal services is already on the increase, say lawyers in the wills and estates planning/management field – and practitioners need to bring themselves up to speed with both the opportunities and the potential exposures that come with servicing older clients.

Mary-Alice Thompson discovered that her concerns about the viability of opening a wills and estates practice in the Kingston market in 2000 were quickly dispelled: "It's indicative of the demand for this type of service that I had a busy practice from day one."

Toronto-based practitioner Ed Olkovich says he's seen a significant uptake in clients looking for estate planning services. Not only are they expecting to manage potentially sizable estates, they also want help in ensuring they have the income needed over the long-term to maintain themselves and their lifestyles – and minimize the tax burden for their children.

And as boomers inherit their parents' wealth, demand for these services will accelerate, says Arthur Fish of Borden Ladner Gervais LLP. "We'll also see other service providers in the insurance and financial services sectors call on lawyers for advice on issues related to their seniors' clientele," he predicts.

But it's not only wills and estates practice that stand to benefit. Boomers' entrepreneurial streak means there will be many family businesses that need to be passed from one generation to the next – and opportunities for corporate lawyers. The increased

demand for retirement accommodation could generate an increase in work for real estate and municipal lawyers prompted by the need for new sites, zoning issues, approvals processes etc. Boomers – accustomed to a better lifestyle than previous generations – will increasingly challenge substandard long-term care facilities, predicts Judith Wahl, executive director of the Advocacy Centre for the Elderly (ACE).

They'll also be looking to better protect themselves when they choose a specific retirement home or long-term care option – and, adds Wahl, it will be critical for lawyers to know how the different options are regulated by legislation as so many of the contracts seniors are asked to sign actually contravene existing protections for seniors. For example, she points out, retirement homes fall under landlord/tenant legislation which regulates how much costs can increase annually – yet many contracts she sees set out increases significantly beyond the scope of what is allowed by legislation.

Boomers and the bar: Dabblers beware!

It's these types of details – and knowledge in numerous practice areas – that lawyers who work with seniors and their families will need to be well-versed in, says Robert Coates, a Law Society certified specialist in wills and estates law. "Family law, real estate, capacity issues, wills and estates – they're all part of elder law practice and the lawyer doing this type of law needs to know about all of these and more to help the client make the right decisions on a number of issues," he says.

INCREASED COMPLEXITY

The increasingly complex legislative environment is another factor that those working with the elderly need to stay on top of: Recent and pending changes in the Health Care Consent Act, the Substitute Decisions Act, Personal Health Information Protection Act, and Mental Health Act present a challenge, says Arthur Fish. "How well these laws function in practice depends on whether we have enough lawyers who really know and understand these laws and how they overlap."

As a practitioner whose clients include public hospitals, long-term care facilities and other health care organizations, Mary Jane Dykeman sees the potential fallout from inadequate legal advice: "The scope of issues that need to be addressed when advising elderly clients – or their children – is becoming larger and increasingly complex, and may put a general practitioner at a disadvantage," she says. "Legislation in the areas of health care, consent, capacity, substitute decisions etc. is fraught with complexities. Moreover, governments are tightening up the regulation of care facilities, and focusing increasingly on seniors issues. These all require lawyers to be consistently up to date and vigilant."

She also suggests that lawyers be cautious when it comes to the directions they take: "Probe, look behind the stated intent. Explain the issues that can arise if the parent gives power of attorney for property to one child, and power of attorney for care to another – in an attempt to treat the two offspring as equals.

There are situations where one child cannot implement the best care option for the parent because the other sibling refuses to loosen the purse strings to pay for that care. Or where the senior who thought he was debt-free discovered a child with a power of attorney had remortgaged the family home – leaving the parent barely able to pay for care. Neither the client, nor the lawyer, is well served when this occurs.”

Not only is the legal arena more complex, but clients themselves are more sophisticated, knowledgeable and demanding, says Ed Olkovich: “Not only do we practise in an increasingly complex environment, but we’re also being held to a higher standard; more accountability seems to rest with us as lawyers. Our exposure potential is significant. The family lawyer who’s trying to advise on the will-related and estate planning issues of a complicated divorce case may want to think twice before giving advice in that area.”

The more complicated lifestyles of boomers – where multiple unions, combined families, various partner arrangements are the norm – further complicate estate planning, and open a potential Pandora’s box of issues for those not well-versed in advising in these areas. Even the fact that female boomers have been more active in the labour force – and will retire with substantial pension benefits – make decision-making regarding tax and estate planning more complex – and retirement planning more difficult.⁽³⁾

Olkovich also points to the potential exposure that the wealth transfer from one generation to the next presents. Citing recent U.S. statistics, he points out that in the next decade the average mid-sized estate will involve millions of dollars in assets. “If you are charging \$250 for a will when that much is involved, you are making a mistake.”

THE CAPACITY TEST

The very fact that more wealth is at stake could mean more litigation around capacity, guardianship and powers of attorney, predict many of the lawyers interviewed. Yet too many lawyers make the wrong assumptions around capacity, says ACE’s Judith Wahl, a lawyer herself. “Only six to eight per cent of

seniors actually lack legal capacity – so it’s important that lawyers understand exactly what legal capacity is, and that they ask for the right assessment if the need arises. Physical appearance, debilitating diseases or incapacity are no indication of a lack of capacity – nor is the mini-mental status test.” (For a detailed discussion of capacity see www.practicepro.ca/elderlaw as well as the next article in this magazine.)

For her part, Mary-Alice Thompson takes the time to get to know the client: “We can’t ship off each client for a \$500 test: It’s our responsibility, as lawyers doing wills, to ask questions that need to be asked to help us assess capacity. I’ll recommend an assessment test if I sense that someone may make a challenge.” Other tools she uses if she expects a challenge include taping the interview with the client (also useful if you believe undue influence may be an issue) or writing into the will the reasons for a specific decision made by the client that could lead to unhappy beneficiaries. Adds Robert Coates: “It’s critical that we as lawyers interview carefully, back up our files with copious notes, even tape instructions – and it’s likely we’ll have to do more of this in the future.”

NO SUCH THING AS A “SIMPLE WILL”

In this environment, doing a will cannot be a loss leader, suggests Robert Coates. “Clients need to know that proper service costs a proper fee – that a lawyer needs to take the time to interview thoroughly, and then take the time to draft information thoroughly into the will. We must all become more diligent and detail-oriented.”

Adds Ed Olkovich: “Dabbling in wills and estates planning is, in my view, a minefield – those who think they can make up in volume what they lack in fees on a file are courting disaster,” he predicts.

What’s needed on the part of lawyers, he adds, is a two-prong approach: First, invest in CLE to keep abreast of legislative changes, new techniques, and precedent-setting cases that are redefining behaviour standards.

Second, the bar has to help educate consumers, and others who are sources of work for lawyers (financial planners, insurance

A seniors-friendly practice

Sensitivity to the client is, says Robert Coates, the hallmark of any successful lawyer. “Estates and family law is personal service law. So it’s just plain courtesy to be sensitive to the client’s needs, to treat everyone with sensitivity and respect, no matter what the age or the issues involved.”

Depending on the specific client, Coates will make any number of accommodations: He’ll slow down the conversation, repeat specific instructions he’s taken, raise his voice, as needed. When doing mediations, he asks beforehand about any physical disabilities that need to be accommodated.

Good lighting is also a must, adds Mary-Alice Thompson, as eyesight deteriorates with age. She tends to print draft documents in larger type to make them easier to read, seats clients so they can easily hear her and, if need be, read her lips as many with hearing disabilities also lip read.

Other tips: Ensure the office and washrooms are wheelchair accessible. Age-appropriate reading materials in the waiting room signal an interest in a seniors clientele, as do chairs that are easy to get into and out of.

Elder law: a broad perspective

The focus on Canada's aging population – and the special needs of seniors – is becoming recognized in legal circles as a practice specialty called elder law.

Elder law, say its advocates, is a multi-disciplinary and multi-faceted practice area that requires practitioners bring more than legal expertise to the table: An understanding of the aging process, knowledge of the services available to and needed by aging clients, sensitivity to relationship dynamics, and an ability to counsel and mediate, are among the skills that lawyers practising elder law may be called on to provide.

The Canadian Bar Association's Elder Law section suggests those practising elder law need to be prepared to deal with numerous issues such as:

- age discrimination;
- general planning for aging;
- elder abuse and exploitation;
- housing of older persons and care facility regulation;
- ethical and practical aspects of advising older clients;
- mental capacity and consent;
- guardianship and court-appointed substitute decision making;
- health care decision-making;
- powers of attorney/mandates;
- elder divorce and separation; and
- lawyer referral panels, and advocacy and *pro bono* work for the elderly of low or middle incomes.

The Elder Law section of the CBA site includes links to articles, presentations, legislative updates and other resources on elder law. For more, see www.cba.org/CBA/sections%5FElder/main/.

Within the Ontario Bar Association, elder law issues are being addressed by the health law, and trusts and estates law sections.

CICA WEBSITE:

A WEALTH OF KNOWLEDGE

Lawyers looking for resources to educate themselves on Canada's aging population may want to visit the Canadian Institute of Chartered Accountants' (CICA) website.

The CICA has launched a multi-faceted program to help chartered accountants capitalize on the wealth management needs of "older clients" and their offspring.

Cash flow planning, pre- and post-retirement planning, insurance reviews, and tax planning are packaged into the PrimePLUS package offered by chartered accountants to help elderly clients (and potential clients) "maintain lifestyle and financial independence." PrimePLUS service providers are expected to have a current knowledge of aging and a commitment to work as part of a multi-disciplinary team that could (for example) include lawyers. CICA helps educate CAs about geriatrics through courses on topics such as health issues associated with aging, communication skills when dealing with the elderly and so on. For more see www.cica.ca and select the **Business Opportunities** link.

agents, accountants, banks, etc.) to the complexities of wills and estates planning. "We need to communicate the **value** that a lawyer's expertise represents. We need to help them understand that it's the service, not the fee, that is important. At the same time, we need to educate lawyers about the need to make wills and estates work the centre of their practice and not a peripheral part of practice. We need to take wills/estates law out of the realm of the commodity which is how it is now seen," says Olkovich.

A legal focus in a multi-disciplinary model

Lawyers looking to capitalize on the boon that Canada's changing demographics represent need to think big says Judith Wahl. "They need to look at this potentially huge client base through a different lens: They'll need to better inform themselves about

the many services that seniors access; they'll need to know about the aging process and its implications. They'll have to bring themselves up to speed with legislation in a wider range of areas than the area in which they may specialize." Experience – in the form of calls from lawyers seeking guidance on where to go for information – tells her that too many lawyers don't understand what they're getting into.

But at the same time, warns Wahl, it's important that lawyers in this arena not confuse themselves with the caregivers. "You're the lawyer: Your client needs you to focus on your legal role and responsibilities – and on knowing the client. You need to see the big picture so that you can help guide your client – but be wary of involving yourself in caregiving or care planning. Leave that to the other experts."

1 Inter-generational wealth transfer – estimated between \$10 billion and \$1 trillion (Report on Business, Globe & Mail, Oct. 9, 2006 pg B.11)

2 Boom, Bust & Echo 2000. pg144

3 New Frontiers of Research on Retirement, Statistics Canada; www.statcan.ca/Daily/English/060327/d060327b.htm