NOVA SCOTIA COURT OF APPEAL
Citation: ***Hayward v. Hayward***, 2011 NSCA 118

Date: 20111220
Docket: CA 334009
Registry: Halifax

Between:

Michael Philip Hayward in his personal capacity as well as in his capacity as Administrator of the Estate of George Michael Hayward

Appellant

v.

Nancy Vera Hayward

Respondent

Judges:	Oland, Fichaud and Beveridge JJ. A.
Appeal Heard:	May 17, 2011, in Halifax, Nova Scotia
Held:	Appeal allowed with costs per reasons of Oland, J.A., Fichaud, J.A. and Beveridge, J.A.
Counsel:	Mr. Erik K. Sturk and Mr. Marc P. Comeau, for the appellant Mr. Gregory D. Barro, for the respondent

Reasons for judgment:

[1] A married person makes a will naming his or her spouse as executor and beneficiary. The marriage fails. The couple divorce. The testator does not change his or her will or revoke it, after the divorce or indeed ever. At his or her death, the most recent will is the one signed prior to divorce. Is the former spouse entitled to act as executor and to take the bequest?

[2] For many years, the answer was clear: yes, because divorce did not automatically revoke a will. Unless a testator revoked his or her will in the manner stipulated in the *Wills Act*, R.S.N.S. 1989, c. 505, the will made prior to the divorce retained its legal effect even after the divorce.

[3] A few years ago, the Legislature amended the *Wills Act*. New provisions, namely ss. 6(2), 8A, and 19A which I will set out later in my decision, were proclaimed effective August 19, 2008. In the decision under appeal, the trial judge held that they did not change the result where the will was made before but the testator died after the amendments. In my respectful view, he erred in law. With these amendments to the *Wills Act*, in those circumstances, a former spouse is no longer entitled to act as the legal representative nor to take the bequest.

Background

[4] In 1995 the late George Hayward made a will ("Will"). It named his then wife, Nancy Hayward, his sole executor and his sole beneficiary. If Nancy did not survive him for 30 days, their son Michael Hayward would be George's sole beneficiary.

[5] The couple separated twice. Each time they entered into a separation agreement which dealt with their property and other rights. When the Haywards divorced in 2004, the Corollary Relief Judgment incorporated the second separation agreement dated June 28, 2004 (the "Separation Agreement").

[6] George Hayward passed away on October 15, 2008, a few weeks after the amendments to the *Wills Act*. He had not revoked his Will. Nor had he made a new one. Michael was granted administration of his father's estate by virtue of the Will and the divorce documents.

[7] Nancy Hayward applied to have her son removed and herself appointed as sole executor and declared beneficiary of her former husband's estate. Justice Allan P. Boudreau granted her application. His decision dated June 7, 2010 is reported as *Hayward Estate (Re)*, 2010 NSSC 6, and his Order issued on July 6, 2010. Michael Hayward in his personal capacity, and as administrator of the estate of George Hayward, appeals his decision and order.

The Wills Act

[8] It is helpful here to set out the provisions of the *Wills Act* which came into effect in 2008. Section 6(2) changed the law by allowing Nova Scotians to prepare holograph wills:

> 6 (2) Notwithstanding subsection (1), a will is valid if it is wholly in the testator's own handwriting and it is signed by the testator.

[9] The *Wills Act* stipulates certain formalities pertaining to a person's signature on a document and the presence and signatures of witnesses to his or her signature, before the document can be accepted as a will, and other formalities pertaining to the revocation, alteration or revival of a will. Section 8A softened the requirements that had to be satisfied:

> 8A Where a court of competent jurisdiction is satisfied that a writing embodies
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> (a) the testamentary intentions of the deceased; or
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> (b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,
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> the court may, notwithstanding that the writing was not executed in compliance with the formal requirements imposed by this Act, order that the writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.

[10] Finally, and most importantly for this appeal, s. 19A dealt with the effect of a divorce:

> 19A Notwithstanding Sections 18 and 19, except where a contrary intention appears by the will or a separation agreement or marriage contract, where, after the testator makes a will, the testator's marriage is terminated by a judgment absolute of divorce or is declared a nullity,
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> (a) a devise or bequest of a beneficial interest in property to the testator's former spouse;
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> (b) an appointment of the testator's former spouse as executor or trustee; and
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> (c) the conferring of a general or special power of appointment on the testator's former spouse,
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> are revoked and the will shall be construed as if the former spouse had predeceased the testator. (Emphasis added)

[11] The chronology of events in the context of this legislation is important: George Hayward made his Will and divorced Nancy before August 19, 2008, the effective date of these changes to the *Wills Act.* However, he died after they were in force.

The Decision Under Appeal

[12] In determining Nancy's application to revoke the grant of administration of George's estate that had been granted to their son, Michael, and to be declared beneficiary of the estate, the judge had to decide several issues pertaining to the application and effect of s. 19A of the *Wills Act* on the Will; the effect, if any, of the Separation Agreement; and, whether any equitable principles estop Nancy from now asserting her claim to her former husband's estate.

[13] In his lengthy and detailed reasons, the judge concluded that s. 19A is forward looking in its effect and cannot be read retroactively or retrospectively; alleged waivers or renunciations contained in the Separation Agreement incorporated in the divorce documents did not contractually bind Nancy Hayward; and s. 8A could not operate to revoke the Will because it did not specifically refer to it. In the result, Nancy Hayward's application to revoke the grant of administration issued to Michael Hayward was granted, and the Will of George Hayward which named her, his former spouse, as executor and sole beneficiary of

his estate, was declared to be in full force and effect. Later in my decision, I will examine the judge's decision more closely.

The Issues

[14] The issues on appeal asked:

1. Did the trial judge err in law in failing to consider that, pursuant to s. 8A of the *Wills Act*, the Separation Agreement is a writing which embodies the testamentary intentions of George Hayward?

2. Did he err in law when he interpreted and applied s. 19A of the *Wills Act* respecting its retroactive or retrospective effect?

3. Did the trial judge err in law in his application of the principles of equitable estoppel to the facts of the case herein?

Standard of Review

[15] The first issue is a question of mixed law and fact, as it requires a consideration of the particular wording of the Separation Agreement and whether the document can amount to writing that comes within s. 8A. However, there is a legal issue which can be readily extricated, namely whether a document must refer to a will before it can be considered under that provision. Therefore, the standard of review is correctness.

[16] The second issue on the interpretation of s. 19A is a pure question of law which attracts the correctness standard. The final issue on the judge's application of the principles of equitable estoppel to the facts is a question of mixed law and fact, which is reviewable on the standard of palpable and overriding error. See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, on standards of review.

Retrospectivity

[17] The major question on this appeal concerns the temporal operation of s. 19A of the *Wills Act* which pertains to the effect of a divorce. Neither of the parties

suggests that it has retroactive effect; that is, that it operates as of a time prior to its enactment.

[18] The issue is narrowed to whether s. 19A is to be read prospectively or retrospectively. If, as the judge found, the provision is prospective, George Hayward's former wife would remain the sole beneficiary of his estate pursuant to his Will. However, if it is retrospective, their divorce terminated her entitlement under his Will.

[19] Whether an enactment has prospective or retrospective effect is a matter of statutory interpretation. The modern approach to statutory interpretation is well established: one is to seek the intent of the legislature by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.

[20] Statutory interpretation is also guided by certain rules, presumptions and principles. In *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1. S.C.R. 271 at p. 279, Dickson J. (as he then was) stated the general principle with respect to retrospectivity of enactments:

> The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.

[21] There is also a presumption that, absent a clear indication in the enactment, Parliament and the provincial legislatures do not intend to prejudicially affect or interfere with the liberty, accrued rights or property of the subject: *Spooner Oils Ltd And Spooner v. The Turner Valley Gas Conservation Board And The Attorney-General of Alberta*, [1933] S.C.R. 629, at p. 638. Where vested rights are affected, the courts will find retrospective application only if the legislative intent is express or "plainly manifested by unavoidable inference": *Dikranian v. Quebec (Attorney General*), 2005 SCC 73, [2005] 3 S.C.R. 530, citing *Spooner* at ¶ 33.

[22] In *R. v. Nova Scotia Pharmaceutical Society*, [1991] N.S.J. No. 169, this court considered the case law and academic commentary on retrospectivity. Clarke, C.J.N.S. for the court wrote:

> [54] ... Professor Driedger stated in his article **Statutes: Retroactive – Retrospective Reflections** (1978), 56 Can. Bar Rev. 264, at p. 264:
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> > "One of the most difficult problems in the process of statutory construction is the application of the presumption against the retrospective operation of statutes."
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> [55] Professor Driedger distinguishes between a statute which will operate retroactively and one which will operate retrospectively. In his text, **Construction of Statutes** (Second Edition, Butterworths 1983), he explains the distinction at p. 186:
>
> > "A retroactive statute is one that operates backwards, that is to say, it is operative as of a time prior to its enactment. It makes the law different from what it was during a period prior to its enactment. A statute is made retroactive in one of two ways; either it is stated that it shall be deemed to have come into force at a time prior to its enactment, or it is expressed to be operative with respect to past transactions as of a past time, as, for example, the **Act of Indemnity** considered in **Phillips v. Eyre.** A retroactive statute is easy to recognize, because there must be in it a provision that changes the law as of a time prior to its enactment. ...
> >
> > "A retrospective statute, on the other hand, changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction. ... A retrospective statute operates as of a past time in the sense that it opens up a closed transaction and changes its consequences, although the change is effective only for the future.
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> . . .
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> [56] At p. 197, Professor Driedger comments that the presumption against retroactivity applies to both types of statutes but that the test to determine retroactivity or retrospectivity is different.
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> > "For retroactivity the question is: is there anything in the statute to indicate that it must be deemed to be the law as of a time prior to its enactment? For retrospectivity the question is: is there anything in the statute to indicate that the consequences of a prior event are changed, not

> for a time before its enactment, but henceforth from the time of enactment, or from the time of its commencement if that should be later?
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> "But not all retrospective statutes attract the presumption; only those, to use the words of Sedgwick, that
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> > 'create a new obligation, or impose a new duty or attach a new disability in respect to transactions or considerations already passed.'
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> "In brief, the presumption applies only to prejudicial statutes; not beneficial ones. Thus, there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Second, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption." [Emphasis in original]

[23] The distinction between retroactivity and retrospectivity explained by Professor Driedger in ¶ 55 of the above quotation has been approved many times, including by the Supreme Court of Canada in *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin,* 2004 SCC 59, [2004] 3 S.C.R. 257 at ¶ 46.

[24] Two additional cases of the Supreme Court of Canada provide useful guidance on retrospectivity. In *Brosseau v. Alberta (securities commission),* [1989] 1 S.C.R. 301, one of the issues was whether certain securities legislation had retrospective effect. L'Heureux-Dubé, J. for the court relied upon Driedger's text to state at ¶ 48 that the presumption against retrospectivity applies only to prejudicial statutes, and not to beneficial ones. The purpose of the securities enactment in *Brousseau* was held not to be penal but rather the protection of the public; accordingly, the presumption against the retrospective effect of statutes was rebutted.

[25] The 2005 decision of the Supreme Court of Canada in *Dikranian* also considered retrospectivity. This was a class action against the Quebec government brought by the appellant on behalf of some 70,000 students in regard to student loans which included an exemption from paying interest during a specified period. Legislative amendments reduced and then eliminated the interest exemption

period. The representative appellant sought reimbursement of interest that had been paid. The Superior Court and a majority of the Court of Appeal dismissed the action.

[26] The majority of the Supreme Court of Canada allowed the appeal. In writing for the majority, Bastarache, J. at ¶ 37-39 approved what Pierre-André Côté set out in *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont: Carswell, 2000) at p. 160-161 as necessary for an individual to have a vested right. This he described as follows:

> Côté maintains that an individual must meet two criteria to have a vested right: (1) the individual's legal (judicial) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement.

According to the majority, the loan certificate contract crystallized the parties' rights and obligations, and there was nothing in the legislative enactments which justified imputing an intention to interfere with vested rights, namely the repayment terms.

The Judge's Reasons on Temporal Operation of s. 19A

[27] I return then to the decision under appeal. In his reasons, the judge referred to writings by Professor Driedger on retrospectivity, and the presumptions against retrospectivity and non-interference with vested rights as set out in the decisions of the Supreme Court of Canada in *Gustavson Drilling* and *Québec (A.G.) v. Healy*, [1987] 1 S.C.R. 158. His analysis then immediately focussed on the case law which had considered s. 19A or provisions similar to s. 19A enacted in other provinces. The British Columbia Court of Appeal in *Matejka Estate (Re)*, [1984] B.C.J. No. 1645 (C.A.) (Q.L.) decided that its enactment was prospective. The Ontario Court of Appeal in *Page Estate v. Sachs*, [1993] O.J. No. 269 (C.A.) (Q.L.) came to the opposite conclusion, holding that its was retrospective. The judge here rejected *Page Estate* and agreed with the conclusion in *Thibault Estate (Re)*, 2009 NSSC 4, which followed *Matejka Estate*, that s. 19A is prospective and cannot be read retrospectively.

Analysis

[28] In my opinion, the reasoning in *Page Estate* is correct in law and s. 19A should be read retrospectively. With respect, in concluding that it operates prospectively, the judge relied on a distinction which is not supported on an examination of that decision. Nor is his conclusion correct in law.

[29] To explain where the judge's reasoning went astray, I must review each of *Page Estate*, *Matejka Estate*, *Thibeau Estate* and the decision under appeal. The facts in each case follow a similar chronology: by will, the testator bequeathed all or a portion of his estate to his then spouse; the couple divorced; amending legislation referring to divorce was proclaimed in force; and, finally, the testator died without revoking or altering his will.

[30] I also point out that in each of *Page Estate* and *Matejka Estate*, the amending legislation included a provision stating which wills were affected by the new provision respecting divorce. Our *Wills Act* does not include any similar provision.

[31] For convenience, I reproduce here s. 19A of the *Wills Act*:

> 19A Notwithstanding Sections 18 and 19, except where a contrary intention appears by the will or a separation agreement or marriage contract, where, after the testator makes a will, the testator's marriage is terminated by a judgment absolute of divorce or is declared a nullity,
>
> (a) a devise or bequest of a beneficial interest in property to the testator's former spouse;
>
> (b) an appointment of the testator's former spouse as executor or trustee; and
>
> (c) the conferring of a general or special power of appointment on the testator's former spouse,
>
> are revoked and the will shall be construed as if the former spouse had predeceased the testator.
>
> [Emphasis added]

[32] I begin with *Page Estate* where the legislation under review was the *Succession Law Reform Act*, R.S.O. 1980, c. 488 (now R.S.O. 1990, c. S.26). The relevant provisions were contained in its Part I:

> 17(2) Except when a contrary intention appears by the will, where, after the testator makes a will, his or her marriage is terminated by a judgment absolute of divorce or is declared a nullity,
>
> (a) a devise or bequest of a beneficial interest in property to his or her former spouse;
>
> (b) an appointment of his or her former spouse as executor or trustee; and
>
> (c) the conferring of a general or special power of appointment on his or her former spouse,
>
> are revoked and the will shall be construed as if the former spouse had predeceased the testator.
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> ...
>
> 43. This Part applies to wills made before, on or after the 31st day of March, 1978 where the testator has not died before that date. (Emphasis added)

The wording of s. 17(2) is virtually identical to our s. 19A.

[33] Blair, J.A., writing for the Ontario Court of Appeal, stated:

> 6 Section 17(2) of the Act is a classic example of retrospective legislation which alters the legal effect of a previous Act, the making of a will, after it has occurred. It fits the definition of a retrospective statute by Professor Driedger in Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at p. 186, as one that
>
> > . . . changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction. . . .
> >
> > A retrospective statute operates as of a past time in the sense that it opens up a closed transaction and changes its consequences, although the change is effective only for the future.

7 There is a well-established presumption against the retrospective operation of statutes. It is described by Driedger, op. cit., p. 185:

> The classic statement of the presumption and the reasons for it was made by Willis J. in Phillips v. Eyre (1870), L.R. 6 Q.B., at p. 23 in these terms:
>
> Retrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. . . . Accordingly, the court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature.

(Emphasis added in original)

8 The critical question in this case is whether the legislature "by express words or necessary implication" intended the Act to have retrospective effect. The answer to this question is provided by the basic rules of statutory construction. The primary rule for the determination of legislative intention is that the words of the statute must be first construed literally in "their ordinary grammatical sense": Victoria (City) v. Bishop of Vancouver Island, [1921] 2 A.C. 384, 59 D.L.R. 399 (P.C.), per Lord Atkinson at p. 387 A.C., p. 402 D.L.R.; Maxwell on the Interpretation of Statutes, 12th ed. (1969), p. 28; and Driedger, op. cit., p. 2. It follows that, if the words of the statute are clear, no further inquiry is required for its interpretation, as Chief Justice Tindal stated in the Sussex (Peerage) Case (1844), 11 Cl. & Fin. 85 at p. 144, 8 E.R. 1034 at p. 1057:

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

9 Read literally, s. 17(2) refers to a specific time in the past after a testator has made a will when the marriage is terminated. At that time, the Act declares that all testamentary dispositions to a spouse are revoked and that the will should be interpreted as if the spouse had predeceased the testator. It is, in my opinion, grammatically correct for the statute to employ the present tense in these circumstances to describe the legal effect of past events, namely, the termination of the marriage and the revocation of testamentary dispositions to a spouse. (Emphasis added)

[34] With regard to s. 43, he stated:

> 10 The effect of s. 43, which applies to wills made before, on or after March 31, 1978, is to attach new and prejudicial consequences from the standpoint of a spouse to a will made at a time in the past before a marriage is terminated. A literal construction of the Act makes the conclusion indisputable that, in this case, the testator's will, made before divorce, must be construed as if the appellant spouse had predeceased him.

[35] Blair, J.A. was aware that almost a decade earlier, the British Columbia Court of Appeal had reached a different conclusion in *Matejka Estate*. Section 16 of the *Wills Act*, R.S.B.C. 1979, c. 434 dealt with the situation where, after the making of the will and before his death, the testator's "marriage is terminated" by divorce. This same phrase is contained in our s. 19A and Ontario's s. 17(2). Writing for the British Columbia Court of Appeal, MacFarlane J.A. stated:

> **15** Section 16 does not, in my opinion, clearly provide for a retrospective application, nor does such a construction arise by necessary and distinct implication. Section 16 does not speak of a marriage which has been terminated but of when the testator's "marriage is terminated". If the legislation had been intended to be retrospective in its application, or had been intended to be read as the appellant submits then it would have provided "where in a Will a testator has given an interest in property to his spouse, and after the making of the Will and before his death his marriage has been terminated by a Decree Absolute of Divorce then, unless a contrary intention appears in the Will, the gift shall be treated as having been revoked, and the Will shall have the effect as if the spouse had predeceased the testator". I see no reason in this case to read the statute as if it had contained such language. A plain reading of the section forecasts the making of a Will, the giving of an interest to a spouse, a divorce, and a death. ... (Emphasis added)

After observing that s. 46(3) of the British Columbia *Wills Act* provides that s. 16 applies to a will made before, on or after March 31, 1960, he continued:

> ... There is no similar provision that the section applies to divorce decrees which were made absolute prior to the proclamation of s. 16. It may be inferred that if the Legislature had intended that the section apply to a previous Decree Absolute of Divorce as well as to previously made Wills it would have said so.

[36] After quoting ¶ 15 of *Matejka Estate*, Blair, J.A. in *Page Estate* explained why he rejected its reasoning:

> 13 I am of the respectful opinion that, for the reasons given above, the reference in s. 17(2) of the Act to the termination of the marriage in the present tense is not inconsistent with its retrospective operation. Nor is the result different because the Act does not state that it applies retrospectively to divorce decrees obtained before the Act came into force, in the same way it applies to wills made before that date. Such a statutory instruction is not necessary because the Act is legislation with respect to wills and not with respect to divorce. It purports only to govern the interpretation of wills after a marriage is terminated and does not purport to affect the status of divorce decrees.

[37] The judge in the decision under appeal was not required to follow *Page Estate*. As a decision of an appellate court of a province other than Nova Scotia, it is not binding. However, his reasons for discounting the decision are not well founded. The judge pointed to a statement in ¶ 18 of *Page Estate* that a passage in an Ontario Law Reform Commission report "appears to provide the conceptual basis of s. 43 of the Act which, in my view, makes the application of s. 17(2) retrospective and not merely prospective...". The judge wrote:

> "[33] There appears to be some uncertainty in **Page Estate** as to whether the language of s. 17(2) alone was sufficient to support a retrospective reading, or whether (as the last passage suggests) s. 43 of the Ontario legislation gave it that effect."

He observed that there is no equivalent provision to s. 43 in our *Wills Act*.

[38] The judge then proceeded to consider *Thibault Estate*. When that matter came before the Nova Scotia Supreme Court, Duncan, J. was faced with the divergent analyses and results in *Matejka Estate* and *Page Estate*. He referred to the *Interpretation Act*, R.S.N.S. 1989, c. 235; observed that although the Final Report of the Nova Scotia Law Reform Commission Discussion Paper of November 2003 acknowledged that there were divergent views on whether divorce should revoke that part of a will which could benefit a former spouse and cited the possibility "of unexpected and undesired results" as a reason for it to recommend that the *Wills Act* be amended, it did not say that the amendment should act

retrospectively; and noted that the *Hansard* transcripts for the legislative debates when the amendment was introduced did not refer to retrospective operation. According to ¶ 21 and 22 of his decision, s. 43 of Ontario's *Succession Law Reform Act* created a "significant distinction", and *Page Estate* had concluded that ss. 17(2) and 43 "when read together, manifested a legislative intention that the provision operate retrospectively." He concluded:

> [24] Section 19A of the **Wills Act** must be read prospectively. Such a conclusion is consistent with the general presumption that legislation should not be read retrospectively except where by clear language or necessary implication it should so operate. The language of the Act is clear and unambiguous, and there is no external evidence to suggest that the legislature intended a contrary conclusion.

[39] In the decision under appeal, after reviewing *Thibault Estate*, the judge stated:

> [36] I agree with Duncan, J.'s conclusion in **Re Thibault Estate** that s. 19A of the *Wills Act* is forward looking in its effect and that it cannot be read retroactively or retrospectively. This must be so regardless of the fact that Nancy Hayward would not be entirely prejudiced by such a reading because she appears to have received a fair and appropriate division of all property upon divorce; which was approximately one-half of her and her husband's property.

[40] At this point, I would add that *Thibault Estate* was also followed by Kennedy, C.J. in deciding *MacDonald v. MacDonald Estate*, 2009 NSSC 323. There the provision under review was not s. 19A but s. 8A. In 2006 Jean MacDonald attempted to make a holograph will; that is, one wholly in her own handwriting and signed by her. However, she did not sign anywhere on the document. Section 6(2) which allows holograph wills, s. 8A which changed the formalities required for a valid will and s. 19A which dealt with divorce came into force on August 19, 2008. Ms. MacDonald passed away on August 29, 2008. The Chief Justice decided the issue of whether ss. 6 and 8A of the *Wills Act* operate retroactively or retrospectively thus:

> 38 As to the conclusion, very simply I am persuaded by the research and reasoning accomplished by Justice Duncan of this Court in the *Thibault Estate* case. Particularly, I am likewise concerned that there is no clear, clearly stated legislative intent to cause the *Wills Act* of 2006, either generally or specifically in

> any of the sections, to be applied retroactively or retrospectively prior to its proclamation in 2008.

He held that the presumption against retroactivity applies, and that the handwritten document of 2006 is not a valid will.

[41] With respect, the judge in the decision under appeal erred in suggesting or deciding that s. 43 of the Ontario legislation was critical to the determination in *Page Estate* that the operation of s. 17(2) was retrospective rather than prospective.

[42] At ¶ 6 of his decision, Justice Blair described that provision as "a classic example of retrospective legislation" and found that it fit the Driedger definition of a retrospective statue. At ¶ 13, he explained his rejection of the analysis in *Matejka Estate*. He then added at ¶ 14 that his conclusion that s. 17(2) was expressly intended to operate retrospectively was "reinforced" by the legislative history of that statute. This was followed by references to several Ontario Law Reform Commission reports on family law, including one suggested that amending legislation should contain an express provision to clarify the legislative intent and so avoid postponing effective reform for a generation or more. That was the origin of s. 43. It was in this context that the judge added that the conceptual basis of s. 43 made the application of s. 17(2) retrospective and not merely prospective and that the two sections manifest the legislative intention that s. 17(2) should operate retrospectively.

[43] The conclusion in *Page Estate* did not hang on the existence of s. 43. Even before referring to that provision, the Ontario Court of Appeal had already determined that s. 17(2) was retrospective. Accordingly, the decision was not distinguishable on the basis that there is no equivalent provision in our *Wills Act.*

[44] My examination of the judge's reasons have required a lengthy foray into the case law to be considered in determining if s. 19A operates prospectively or retrospectively. Having explained how he went astray in his analysis, I return to the issue: is s. 19A of the *Wills Act* to be read prospectively or retrospectively? In my view, s. 19A operates retrospectively.

[45] While the decision of the Ontario Court of Appeal in *Page Estate* is not binding, I am persuaded that its reasoning is impeccable and led to the correct

result. In it, Blair, J.A. explained retrospectivity, the presumptions against retrospectivity and interference with vested rights, and identified the dominant principle in all questions of statutory interpretation as the supremacy of legislative intent. He decided that, "by express words or necessary implication" the legislature intended the enactment to have retrospective effect.

[46] Similarly, I am of the view that, when construed, in their ordinary literal sense, the words of s. 19A of the *Wills Act* are clear and unambiguous, and demonstrate a legislative intention that the provision operate retrospectively. Here again is the critical portion of s. 19A:

> ... where, after the testator makes a will, the testator's marriage is terminated by a judgment absolute of divorce ... the will shall be construed as if the former spouse had predeceased the testator.

Read literally, s. 19A refers to a time in the past after the testator has made his will when his marriage is terminated by divorce. At that time, according to s. 19A, his will should be interpreted as if his spouse has predeceased him.

[47] Section 19A satisfies the test established by Professor Driedger and set out in ¶ 56 of the *Nova Scotia Pharmaceutical Society* decision quoted earlier, namely:

> ... is there anything in the statute to indicate that the consequences of a prior event are changed, not for a time before its enactment, but henceforth from the time of the enactment, or from the time of its commencement if that should be later?

In my view, the wording of s. 19A clearly shows that the consequences of divorce (a prior event) is a change from the time that provision took effect. The absence of any transitional provision makes no difference to the analysis.

[48] Where, as here, the words are clear, the text of the enactment itself is sufficient to determine legislative intent. It is not necessary to search for guidance in the presumptions which assist statutory interpretation, nor in materials surrounding the enactment that might throw some light in the search for legislative intent.

[49] Here the presumption against retrospectivity which applies to prejudicial statutes such as s. 19A is fully answered by the clear wording of that text. The

presumption against inference with vested rights is not applicable because, as the Supreme Court of Canada explained in *Dikranian*, in order to have a vested right, an individual's legal situation must be tangible and concrete and this legal situation must have been sufficiently constituted at the commencement of the new statute. Nancy Hayward's entitlement under the will was no more than an expectancy; it did not become a reality until George's passing. Accordingly, she did not have a vested right which would bring that presumption into play.

[50] In my view, the judge erred in law in deciding that s.19A of the *Wills Act* is prospective. It is not, s. 19A operates retrospectively. I would allow this ground of appeal.

Section 8A and The Separation Agreement

[51] There are two issues which pertain to the Separation Agreement. The first is the one framed by the appellant; the second is one which arises from my determination that s. 19A operates retrospectively.

[52] In his decision, the judge dealt with the application of s. 8A in a single paragraph:

> [65] The separation agreement is "a writing" that was not executed in compliance with the formal requirements of the *Wills Act*. Michael Hayward says the separation agreement expressed an intention by his father to alter his "testamentary intentions," in that it "expressed testamentary intentions of George Hayward that the agreement was a final settlement between the Haywards." This would be a strained application of s. 8A, given that the separation agreement made no reference to Mr. Hayward's Will. I therefore find that s. 8A could not operate to revoke Mr. Hayward's Will. (Emphasis added)

[53] The issue as framed by the appellant is whether the trial judge erred in law in failing to consider that, pursuant to s. 8A of the *Wills Act*, the Separation Agreement is a writing which embodies the testamentary intentions of George Hayward. He argues that the judge did not undertake any analysis of the interpretation or application of s. 8A and in particular, whether the Separation Agreement embodied the testamentary intentions of George Hayward. His position is that that document shows that the parties agreed that Nancy would not receive anything under George's Will.

[54] The second issue arises from the wording of s. 19A on the effect of divorce. It includes an exception where "a contrary intention appears by . . . a separation agreement". I must decide whether the Separation Agreement shows any such contrary intention. If so, then the Will made prior to divorce would govern the disposition of George Hayward's estate.

[55] The recitals to the Separation Agreement stated that the parties wished "to resolve matters of support and financial obligations and division of their property." The document included mutual waivers of maintenance or support, and attended to the division of real and personal property. It contained the following provisions:

> RELEASE OF RIGHTS TO ESTATE
>
> 17.01 The Husband and Wife each hereby release all rights which he or she might have under the laws of any jurisdiction to any share in the estate of the other or to the administration of the estate of the other, except as otherwise provided in this Agreement.
>
> RELEASE OF RIGHTS TO MAINTENANCE AND PROPERTY
>
> 18.01 Except as provided in this Agreement, the husband and wife release each other from all rights and claims which they may have against each other for maintenance or support, or for property division or ownership under the laws of any jurisdiction and, in particular, under the ***Maintenance and Custody Act,*** the ***Matrimonial Property Act,*** the ***Intestate Succession Act,*** the ***Testator's Family Maintenance Act,*** the ***Pension Benefits Act*** and the ***Divorce Act***, 1985 or any successor legislation.
>
> . . .
>
> 18.04 This Agreement is a full and final settlement of all matters outstanding between the parties and can be varied only by an agreement in writing between the parties or by a Court of competent jurisdiction.

George Hayward and Nancy Hayward were each represented by counsel when they signed the Separation Agreement. Neither party to this appeal has raised any question as to its validity.

[56] When the appeal was heard, there were no Nova Scotian cases which had judicially considered s. 8A of the *Wills Act*. Since s. 23 of the Manitoba *Wills Act* and our s. 8A are strikingly similar, the appellant relied upon *George v. Daily*, (1997) 143 D.L.R. (4th) 273 (Man. C.A.) (Q.L.). There, the document in question

was a letter written by the accountant for the deceased to the lawyer for the deceased outlining the instructions of the deceased for the preparation of a new will. When he met with his lawyer, the client confirmed his instructions. He was advised to first obtain a medical certificate confirming his mental capacity. Two months later, without having signed any new will, he died.

[57] Writing for the court, Philp, J.A. stated:

> 27 Courts have demonstrated that they are quite capable of applying s. 23 in order to overcome the consequences of defective or imperfect compliance with the formal requirements of the Act. ... The duty of the courts, so eloquently expressed by Montague J. (later, Montague J.A.) in In re Eames Estate [1934] 3 W.W.R. 364, has not changed. He wrote (at p. 366):
>
> > The Court owes a sacred duty to protect a man's last will. The guiding principle is to give effect, if possible, to his intentions. Where the law designates a form in which such must be expressed this latter limits the operation of the principle, but the instrument itself is not destroyed. It is still the act of the deceased, and if though it is bad in one form it is good in another, the Court must enforce it. Our statute encourages testators to draw their own wills. That being so, the statute and any such will should be construed benignly and every effort made to avoid any construction which would invalidate the will.
>
> ...
>
> 60 It remains a fundamental and universal proposition "that nothing can receive probate which was not intended to be a testamentary act by the testator": per Lord Selborne L.C. in White v. Pollock (1882), 7 App.Cas. 400 at p. 405. In Bailey's The Law of Wills, (7th ed. 1973, Pitman Publishing) the principle is stated (at pp. 65-6): "No will is entitled to probate unless the testator executed it with the intention that it should take effect as his will." . . .
>
> . . .
>
> 65 The term "testamentary intention" means much more than a person's expression of how he would like his/her property to be disposed of after death. The essential quality of the term is that there must be a deliberate or fixed and final expression of intention as to the disposal of his/her property on death: Re Gray; Molinary v. Winfrey [1961] S.C.R. 91; and Canada Permanent Trust Co. v. Bowman [1962] S.C.R. 711.

> 66 In my opinion, these are the principles which must be applied in the determination under s. 23 as to whether or not a document or writing embodies the testamentary intentions of the deceased. Whether it is the deceased's own instrument or the notes or writing made by a third-party, the crucial question to be answered is whether the document expresses the animus testandi of the deceased - a deliberate or fixed and final expression of intention as to the disposal of his/her property on death.

[58] The court held that the evidence was not sufficient to meet the onus on the accountant to establish that his letter embodied the testamentary intentions of the deceased. There was no direct evidence that the deceased ever saw or read the letter or had it read to him, or that he intended it to "be dispository or to operate provisionally" until the lawyer prepared the will.

[59] Since this appeal was heard, the Supreme Court of Nova Scotia has rendered two decisions which judicially considered s. 8A of the *Wills Act*: *Robitaille v. Robitaille Estate*, 2011 NSSC 203 and *Komonen v. Fong*, 2011 NSSC 315. While they are fact specific, a brief summary usefully illustrates the types of situations which may require consideration of s. 8A and the law to be applied.

[60] In *Robitaille Estate*, a woman gave instructions to her lawyer in November 2009, and later confirmed instructions for a revised will through a third party. She fell ill and was hospitalized. She signed the revised will, but it was not properly witnessed. She died in December 2009. In his decision, LeBlanc. J. referred to *George v. Daily*. He held that, in the particular circumstances before him, the revised will represented a deliberate or fixed and final expression of the woman's intentions to dispose of her property on death. He allowed the uncontested application for a declaration that, although not executed in compliance with the formal requirements of the *Wills Act*, the document was valid and fully effective.

[61] In *Komonen*, the document reviewed was a printed will form signed by the deceased and with portions completed in pencil, which was found in his home after his passing. The evidence included his diaries and other written communications. In her decision, Smith, A.C.J. also quoted the passages from *George v. Daily* set out above. She determined that the applicant had not met the burden of satisfying the court, on a balance of probabilities, that the document in question embodied the

testamentary intentions of the deceased; that is, his fixed and final intention as to the disposal of his property upon death.

[62] Here, the appellant submits that the Separation Agreement expressed George Hayward's testamentary intention to alter his Will so as to make the appointment of Nancy Hayward as executrix and the gift to her as residual beneficiary ineffective. According to the appellant, the Separation Agreement and, in particular Clause 17.01 whereby each party released all rights to any share in the estate of the other, falls squarely within the requirements of s. 8A. He urges that the judge erred by relying on the omission of any reference to a will in the Separation Agreement as determinative of the issue of the application of s. 8A and by not undertaking any analysis to determine if that clause embodied the testamentary intentions of George Hayward.

[63] The respondent counters that, although the judge referred to s. 8A in only one paragraph of his decision, elsewhere in his decision he considered the Separation Agreement in analysing *Morrell Estate v. Robinson*, 2008 NSSC 295 and this court's decision in *Robinson v. Morrell Estate*, 2009 NSCA 127 which affirmed that decision on appeal. He argues that the judge's consideration of s. 8A should be viewed in conjunction with his consideration of the Separation Agreement and that case law.

[64] In my view, the decisions upon which the respondent bases her arguments are not helpful. In those cases, the separation agreement, divorce and death of the testator all happened before the enactment of ss. 8A and 17A of the *Wills Act*. Moreover, the issue was whether, before a testator's death, a person can contractually bind himself or herself to renounce a testamentary gift. The *Morrell Estate* decisions contain no analysis of the effect of the legislative amendments to the *Wills Act* which became effective in 2008, after the Separation Agreement, the Will and the Haywards' divorce, but before George Hayward's passing.

[65] Nothing in the wording of s. 8A of the *Wills Act* suggests that the provision is applicable only if the document sought to be accepted as a will includes explicit reference to a testator's previous will. I am unable to ascribe any other meaning to ¶ 65 of the judge's decision. Where he found that this omission was determinative, the judge did not proceed to conduct any analysis to decide whether the document contained the testamentary intentions of George Hayward. On the first of the

issues pertaining to Separation Agreement, it is my view that the judge erred in law in his interpretation of s. 8A and by failing to consider whether the Separation Agreement satisfies that provision.

[66] The determination of the second issue depends on the wording in the Separation Agreement. A detailed examination of that document does not disclose any wording that even suggests that George Hayward had any intention that, following their divorce, Nancy Hayward would still take under his Will. Accordingly, there is no contrary intention which would affect the retrospective operation of s. 19A and, more particularly, would preserve Nancy Hayward's appointment as executor and her entitlement to benefit under her former husband's Will.

Estoppel

[67] In his factum, the appellant submitted that the trial judge erred in law in his application of the principles of equitable estoppel to the facts of this case. He did not raise this ground in his oral agreement, but indicated that it was not withdrawn.

[68] The issue before the trial judge was whether there were any equitable principles which estop Nancy Hayward from now asserting her claim to George Hayward's estate. In his decision, the judge reviewed the law on promissory estoppel before stating at ¶ 55 that there appeared to be no equitable estoppel case law which was near enough to the circumstances before him to provide much guidance. He continued:

> [55] ... By contrast, in the present case, there was no waiver of a right to receive under the Will, nor was there any revocation of the Will. In order for the wife in the present case to be estopped from acting as administrator or accepting a devise or bequest under the Will, there would need to be evidence that she "entered into a course of negotiation" that led the testator "to suppose that the strict rights under the contract would not be enforced," as well as evidence from which it can be inferred that the wife "intended that the legal relations created by the contract would be altered as a result of the negotiations." (See the **Burrows** case at p. 615). As Sopinka, J. put it in **Maracle** at ¶ 13:
>
> > [t]he party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the

> representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.
>
> [56] It is therefore difficult to fit the present circumstances within the technical boundaries of estoppel. ...

[69] According to the appellant, a legal relationship between George and Nancy Hayward was created when he executed his Will, Nancy's signing of the Separation Agreement amounted to an unambiguous statement that the previous legal relationship had been altered and, relying on these representations by Nancy, George therefore acted to the unalterable detriment of his estate by not amending his Will.

[70] To dispose of this issue, I need only point out that there was no evidence that in choosing not to amend his Will, George Hayward relied on Nancy Hayward's execution of the Separation Agreement. I would dismiss this ground of appeal.

Disposition

[71] I would allow the appeal. Section 19A of the *Wills Act* operates retrospectively. There is no contrary intention in the Separation Agreement which, pursuant to s. 8A, would allow the application of the exception in s. 19A. As a result, the appointment in George Hayward's Will of Nancy Hayward as executor and the bequest to her of estate to her are revoked. All other provisions of the Will remain in full force and effect.

[72] The issues raised on appeal are novel. I would order costs of both parties on a solicitor-client basis, to be paid out of the estate.

Oland, J.A.

Concurring reasons for judgment of Beveridge, J.A.:

[73] I have had the privilege of reading my colleague's reasons in draft. I am in reluctant agreement with the result. I will explain later why I say my agreement is reluctant. With respect, I am unable to agree with all of the reasons set out by Justice Oland for allowing the appeal.

[74] There were three main arguments advanced by the appellant: s. 19A operated so as to void the designation of the respondent as the executrix and primary beneficiary; the separation agreement that had been assimilated into the Corollary Relief Judgment operated as a writing that embodied the intention of the deceased to alter his will within the meaning of s. 8A; and estoppel. The argument about estoppel has no merit and I agree with the disposition of this issue by my colleague.

[75] This case is essentially about the temporal application of the amendments to the *Wills Act*. The question of the temporal application is frequently resolved by principles of statutory interpretation – that is, when did the legislature intend the legislation or amendments to take effect. The decision by Justice Boudreau is the second decision of the Nova Scotia Supreme Court that has decided that if this legislation were applied so as to disentitle a former spouse from benefiting from *any* gift, or appointment contained in a will, it would have retrospective effect. Since it is said that there is a well known presumption that a legislature does not intend to make legislation operate retrospectively, it should not be interpreted to impose prejudicial consequences prior to the commencement date of the legislation.

[76] The first decision was that of Justice Duncan in *Thibault Estate (Re), supra*. According to Duncan J. the 2006 amendments, proclaimed in force on August 19, 2008, only applied to revoke bequests to former spouses in wills where the divorces occurred after August 19, 2008. The trial judge adopted the analysis and conclusion of Justice Duncan. Similar reasoning was applied by Kennedy C.J.S.C. in *MacDonald v. MacDonald Estate, supra* with respect to a handwritten will made prior to August 19, 2008 and not executed with the usual formal requirements of the *Wills Act*.

[77] When the legislature introduced the amendments, it made no specific provision to guide the citizens of Nova Scotia or the courts as to which wills would be affected. What then did it intend?

[78] My colleague has accurately and thoroughly set out some of the academic and judicial discussion about retroactive, retrospective and prospective operation of statutes. It is a topic that has sparked considerable confusion and discussion. At one time, all legislation was deemed to come into force as of the day of the first session of Parliament (S.G.G. Edgar, *Craies on Statute Law*, 7th ed. (London: Sweet & Maxwell, 1971), p. 383). Hence, legislation operated at a time before it had actually been passed. This anomaly was changed by statute in England in 1793 (*Craies*, *ibid*). Thereafter, in the absence of a specific provision, legislation commenced on the day of Royal Assent which date the Clerk is to indorse on every Act.

[79] In Nova Scotia, the *Interpretation Act*, R.S.N.S. 1989, c. 235 governs commencement of legislation. It is similar to the provisions first enacted in England over 200 years ago. The relevant provisions here are:

> 3 (1) The Clerk of the House of Assembly shall indorse on every Act of the Legislature, immediately after the title of the Act, the day, month and year when the Act was, by the Lieutenant Governor, assented to or reserved, and in the latter case the Clerk shall also indorse thereon the day, month and year when the Lieutenant Governor has signified, either by speech or message to the Legislature or by proclamation, that the Act was laid before the Governor General in Council and that the Governor General in Council was pleased to assent thereto.
>
> (2) The indorsement shall be taken to be a part of the Act, and the day of the assent or signification, as the case may be, is the date of the commencement of the Act, if no later commencement is therein provided.

[80] The amendments to the *Wills Act* were introduced as Bill No. 23. The Bill received First Reading on June 30, 2006, Second on October 31 and was passed at its Third Reading on November 23, 2006. It received Royal Assent that day. Although the Bill lacked any transition provisions, the Legislature delayed commencement by s. 7, which provided: "This Act comes into force on such day as the Governor in Council orders and declares by proclamation". Proclamation was not until August 19, 2008.

[81] The history of the legislation and circumstances surrounding its introduction do not disclose any reason for the delay of commencement. While it might be said that delay of commencement shows an intent by the legislature that there be no further restriction on retrospective operation, I do not rest my reasons on this premise (see *Craies*, *ibid*, p. 393; *Maxwell on Interpretation of Statutes*, 12th Ed. p. 226).

[82] I will explain why I do not agree with the reasons of my colleague Justice Oland. I accept without reservation her description of the general principles of interpretation of legislation. I would add to those principles the direction given by the legislature in the *Interpretation Act*:

> 9 (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.
>
> (2) "Now", "next", "heretofore" or "hereafter" in an enactment refer to the time when the enactment comes into force.
>
> (3) In an enactment, "shall" is imperative and "may" is permissive.
>
> (4) "Herein" used in a Section or provision of an enactment relates to the whole enactment and not to that Section or provision only.
>
> (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and

(g) the history of legislation on the subject.

[83] My colleague faults the trial judge in distinguishing the decision of the Ontario Court of Appeal in *Page Estate, supra*. She then views the wording of s. 19A as demonstrating a clear legislative intent that the amendment be given retrospective operation sufficient to overcome the "presumption against retrospectivity" (para. 48). With respect, I see nothing in the wording of s. 19A or the other amendments that assists one way or the other. I also agree with the analysis of the trial judge where he distinguished *Page Estate*.

[84] The language of s. 19A is in the present tense: "the testator makes a will, the testator's marriage is terminated by a judgment absolute of divorce", then provisions benefitting a former spouse "are revoked". The sequence of events, that is the will must be made before the divorce, is a given, otherwise there is no change in the law. If the will is made after divorce, the testator is free to benefit anyone, including a former spouse. There is no need to alter the stated testamentary wishes expressed in the will.

[85] Before discussing *Page Estate*, it is appropriate to first consider the other leading case in Canada on the temporal application of a similar amendment to the British Columbia *Wills Act*, *Re Matejka Estate* (1984), 8 D.L.R. (4th) 481 (B.C.C.A.), [1984] B.C.J. No.1645 (Q.L.). The deceased made his will on January 12, 1976, leaving 45 per cent of his estate to his then wife, 10 per cent to his step-daughter and the remainder to his sister. The deceased and his wife divorced March 20, 1980. The amendment to the British Columbia *Wills Act* came into force by proclamation on August 1, 1981. The amendment provided that where a testator gives an interest in property to his spouse, and after making the will and before death, the marriage is terminated by divorce, absent a contrary intention in the will, the gift is revoked and the will takes effect as if the spouse predeceased the testator. The deceased died on August 18, 1981 without changing his will.

[86] Section 16 was part of the *Revised Statutes of British Columbia*, 1979 (Chapter 434). There was a transitional provision that provided that the new legislation was applicable "only to all wills made after March 31st, 1960" (s. 46(1)). Other provisions were made applicable to all wills if the person died after March

17, 1960[1]. As mentioned, the deceased's will was made on January 12, 1976 and, hence, s. 16 applied to it. Notwithstanding this legislative direction, the Court of Appeal decided that the change in the law did not apply to revoke the testamentary gift because the divorce occurred before the legislation came into force.

[87] Macfarlane J.A. wrote the judgment for the court. He reasoned that although no vested rights were being affected, the presumption against retrospective application of the legislation applied because it would create a prejudicial consequence to a prior event. He said this:

> **16** If s. 16 were to be applied in this case it would attach a new duty, penalty, or disability -- a prejudicial consequence -- to a prior event. Clearly it would have a prejudicial effect upon the respondent, whom, it appears, had been divorced without obtaining a proper division of family assets. Prior to the enactment of s. 16 the common law applied, and she would not have lost her rights under the Will of her former husband upon being divorced from him, without some step on his part, such as remarriage or the execution of a new Will. I am unable to construe the legislation as intending to create such a prejudicial consequence. I think that the presumption against retrospectivity applies.

[88] My colleague adopts the analysis and conclusion of the Ontario Court of Appeal in *Page Estate, supra* as governing the outcome in this case. She faults the trial judge in distinguishing *Page Estate* from the situation in Nova Scotia. With respect, I do not agree. Blair J.A. wrote the judgment of the court in *Page Estate.* I interpret his reasons as being that the Ontario legislation was intended to operate retrospectively. In my opinion, he reached this conclusion by relying on s. 43 of the Ontario statute which provided:

> 43. This Part applies to wills made before, on or after the 31st day of March, 1978 where the testator has not died before that date.

[89] Blair J.A. clearly viewed this transitional provision as key to finding the legislation was to be given retrospective effect. He said:

> **10** The effect of s. 43, which applies to wills made before, on or after March 31, 1978, is to attach new and prejudicial consequences from the standpoint of a

---

[1] Section 46 was amended by the *Attorney General Statutes Amendment Act*, S.B.C. 1982, c. 46, making s. 16 applicable to a will made before, on or after March 31, 1960.

> spouse to a will made at a time in the past before a marriage is terminated. A literal construction of the Act makes the conclusion indisputable that, in this case, the testator's will, made before divorce, must be construed as if the appellant spouse had predeceased him.

[90] There is no question that Blair J.A. also referred to the language used by the Ontario equivalent to s. 19A of our *Act*, but he did so in the sense that there was nothing noteworthy in the language that demonstrated a legislative intent that the legislation only operated to disentitle a former spouse where the will or divorce occurred after the commencement date of the legislation.

[91] After observing that it was grammatically correct for the legislature to use the present tense, Blair J.A. noted the reasoning of Macfarlane J.A. in *Re Matejka* where the outcome was apparently influenced by two things. The first was the use of the present tense in the British Columbia legislation. Macfarlane J.A. was of the view that if the legislation was intended to operate to disentitle former spouses that were divorced prior to the enactment, it would have said "after the making of the will and before his death his marriage *has been* terminated." The second was the view of Macfarlane J.A. that the transition section in British Columbia did not specifically say that the legislation applied to divorce decrees made prior to the commencement date.

[92] This led Blair J.A. to observe:

> **13** I am of the respectful opinion that, for the reasons given above, the reference in s. 17(2) of the Act to the termination of the marriage in the present tense is not inconsistent with its retrospective operation. Nor is the result different because the Act does not state that it applies retrospectively to divorce decrees obtained before the Act came into force, in the same way it applies to wills made before that date. Such a statutory instruction is not necessary because the Act is legislation with respect to wills and not with respect to divorce. It purports only to govern the interpretation of wills after a marriage is terminated and does not purport to affect the status of divorce decrees.

[93] Blair J.A. also referred to the legislative history of the amendments to the Ontario legislation. He recounted the Ontario Law Reform Commission reports that documented its view that divorcing spouses unwittingly end up benefitting their ex-spouses by failing to change their wills post-finalization of the divorce proceedings. The Commission noted that the law's assumption that divorced

testators wanted to continue to benefit their ex-spouses ran contrary to the expectations of most divorcing couples. It recommended the law be changed so that after divorce, wills be read as if the former spouse had died before the testator unless the will expressly said otherwise. The Commission cautioned against postponing its recommended reform and further recommended a clear transitional provision to prevent postponement. Blair J.A. quoted the concern expressed by the Commission:

> Since it may well be presumed, in the absence of clear evidence to the contrary, that legislation is intended for prospective operation only, the amending statute should contain an express provision clarifying the legislative intention on this point. To make the legislation prospective only would be, in effect, to postpone reform for a generation or more, and there are no justifiable grounds for so doing.
>
> [emphasis in original quote by Blair J.A.]

[94] This led Blair J.A. to conclude:

> **18 The italicized passage appears to provide the conceptual basis of s. 43 of the Act which, in my view, makes the application of s. 17(2) retrospective and not merely prospective**. The effect of s. 43 is demonstrated by comparison with the Wills Act, R.S.O. 1970, c. 499, which the Act repealed. The former Wills Act contained several sections which were applicable to wills made after specified dates, for example ss. 6, 7, 19(9) and (10), but none which applied to wills made before a specified date. **Section 43 of the Act, in contrast, makes it applicable to wills made before, on or after March 31, 1978, and there by shows that the legislature intended to change the law and to make it applicable to the testator's will made in 1968 before the Act was passed.**
>
> [emphasis added]

[95] I therefore see no error by the trial judge here and in *Re Thibault Estate* in relying on the existence of s. 43 in the Ontario legislation to distinguish the case of *Page Estate.* Legislatures do not legislate in a vacuum. They, like all citizens, are presumed to know the law (Rose Sullivan, *Sullivan & Driedger on the Construction of Statutes*, 4th ed. (Markham, ON.: Butterworths, 2002) p. 154; 330-31). In light of *Re Matejka* and *Page Estate* and in the context of the legislative initiatives in British Columbia and Ontario, a strong argument could be made that if the Nova Scotia legislature intended the amendments to impact wills where a divorce occurs prior to the commencement date of the legislation, it would have said so. Despite the absence of such a provision, I am convinced by proper

application of the principles surrounding this issue that the legislation does apply. I will endeavour to explain why.

[96] Section 9(5) of the *Interpretation Act* directs that legislation shall be deemed remedial and interpreted to insure the attainment of its objects by considering a host of matters including the mischief to be remedied, the object to be attained, and the history of legislation on the subject. As noted by Justice Duncan in *Re Thibault Estate*, the issue of possible changes to the *Wills Act* was reviewed by the Nova Scotia Law Reform Commission. The Commission issued a discussion paper in July 2003. The Paper considered all of the various amendments that made their way into *An Act to Amend Chapter 505 of the Revised Statutes, 1989, the Wills Act*. With respect to the issue of impact of divorce on the provisions in a will, it recognized that there are reasons for and against amending the *Wills Act* so as to revoke wills upon divorce, but the reasons for making such a change were not sufficiently compelling.

[97] The final report of the Commission was released in November 2003. The Commission noted the *Uniform Wills Act* provisions that revoke gifts or appointments to an ex-spouse absent a contrary intention in the will, and a direction that the will be construed as if the spouse had predeceased the testator. The Commission referred to the adoption in British Columbia, Saskatchewan, Manitoba, and Ontario of this provision. Similar legislation exists in the United Kingdom.

[98] The Commission received mixed reviews on such a proposed change in Nova Scotia. Nonetheless, it recommended adoption of the *Uniform Wills Act* provision because:

> Having taken all comments into account, the Commission is of the view that having one's will changed may not be foremost in a person's thoughts at the time of a divorce. Inadvertence may therefore lead to an ex-spouse benefitting under a will where this would not have represented the testator's post-divorce wish. Although a lawyer may recommend that a divorcing client consider changes to his or her will, the client may choose to put off such changes. Moreover, some people do not seek legal advice when obtaining a divorce. In either case, not changing a will may lead to unexpected and undesired results in the distribution of the testator's estate.

[99] There was no specific discussion by the Commission about the temporal application of the proposed amendments. The closest it came to dealing with the subject was its concern over insuring divorcing parties were aware of the consequences that would flow from a divorce on their testamentary dispositions. It remarked:

> A number of commentators suggested a standard notice about the effect of divorce would be appropriate. The Commission agrees. Consistent with the Commission's recommendation involving a notice about the effect of marriage, a notice about the effect of divorce on wills should be provided to divorcing parties by the prothonotary (chief clerk) of the Nova Scotia Supreme Court. The Office of the Registrar General should provide an equivalent notice to people who de-register a domestic partnership.

[100] During the second reading of Bill No. 23, all of the members of the Assembly who spoke, praised the work of the Law Reform Commission and noted the Bill reflected what the Commission recommended. There was no discussion about the temporal application of the legislation.

[101] From the context, and extrinsic aids available, the most that can be said is that the mischief meant to be remedied by s. 19A was to guard against a former spouse taking benefit from appointment and gifts set out in a will where the will-maker did not truly desire that to occur. The legislation presumes that the maker of the will after divorce no longer wants to bestow any such benefits on the former spouse. It places the burden on the testator who divorces and who still wishes to benefit his former spouse to have already said so in his will, or make his intention to do so in some additional testamentary disposition, separation agreement or marriage contract. In the absence of such an expressed intent, it is presumed he or she no longer wants to benefit the former spouse.

[102] The law was therefore changed. Before s. 19A, the law in effect presumed the will-maker still wished to benefit the former spouse. If he or she no longer wished do so, the burden was on the will-maker to change his or her testamentary wishes. If the will-maker were preoccupied, or unaware of the need to take action, the former spouse may well take under the will in addition to the financial benefit he or she may have received in the divorce judgment.

[103] In my opinion, the provisions of S.N.S. 2006, c. 49 operate as of the date of death of the testator. When he died on October 15, 2008 the law had changed. The legislation provided that from August 19, 2008 forward, bequests to, or appointments of, a former spouse, made by a will-maker who is divorced, absent a contrary intention in enumerated documents, are revoked. This amendment was part of a number of amendments to the *Wills Act*. I see no basis to turn to presumptions to determine when the legislation operated to change the law.

[104] With all due respect to the judgments in *Re Matejka* and *Page Estate*, the presumption against retrospective operation of legislation does not apply. In *Matejka* the court said application of the legislation would attach a new duty, penalty, disability or prejudicial consequence to a prior event and applied the presumption to prevent disentitlement of Mrs. Matejka who had divorced without obtaining a proper division of family assets. In *Page Estate*, the presumption was also said to apply but was overcome by the clear legislative intent set out in s. 43 of the amending legislation. I will explain why, with respect to those that hold a contrary view, the so-called presumption against retrospective operation does not, in my opinion, apply.

[105] There have been various expressions of what is meant by retrospective operation of a statute. One of the clearest is found in *Craies on Statute Law*, *supra*, where the learned author writes (p. 387):

> A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. But a statute "is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing."

[106] E.A. Driedger, one of the preeminent authors on statutory interpretation wrote in his seminal article "*Statutes: Retroactive Retrospective Reflections*" (1978), 56 *C.B.R.* 264 that one of the most difficult problems in the process of statutory construction is the application of the presumption against the retrospective operation of statutes (p. 264). The Canadian Bar Review article was his second published study of the subject. In referring to his earlier work on the subject he commented (p. 267):

> In formulating the foregoing conclusions I was, of course, concentrating on the meaning of retrospective . It is obvious that not all retrospective statutes attract the presumption; only those, to use the words of Sedgwick, that "create a new obligation, or impose a new duty or attach a new disability in respect to transactions or considerations already passed" . In brief, the presumption applies only to prejudicial statutes ; not beneficial ones. ...

[107] Driedger's classification of retroactive and retrospective legislation has been oft quoted and relied upon[2]. He said (p. 548-549):

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original]

[108] He summed up his views as follows (p. 271):

> In conducting my lectures in the following year, I realized that I still did not have the complete answer. I now realized that there are three kinds of statutes that can properly be said to be retrospective, but only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Secondly there are those that attach prejudicial consequences to a prior event; they attract the presumption. Thirdly there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not a consequence of the event; these do not attract the presumption.

[109] Applying these principles to the case at hand, the amendments to the *Wills Act* may well be labelled retrospective legislation since they changed the law from what it would otherwise be with respect to a prior event, but it is not legislation that attracts any presumption. Mr. Hayward did not die before August 19, 2008. If he had, the law as of the date of his death would have applied and his former

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[2]See for example, *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Epiciers Unis Metro-Richelieu Inc. v. Collin*, 2004 SCC 59

spouse would be entitled to act as executrix and inherit according to his will dated February 10, 1995.

[110] Mr. Hayward died on October 15, 2008. On that date, the law was that his divorce, absent a contrary intention, revoked the appointment and bequest to his former spouse. It may be said that s. 19A of the *Wills Act* fits the definition by Driedger of a retrospective statute – it looks backward and attaches a new consequence as a result of a divorce that happened in the past. In other words, it changed the law from what it would otherwise be with respect to a prior event.

[111] But as Driedger makes clear, such a law does not always attract the presumption. The presumption is against giving a statute retrospective operation or effect. It only applies to those statutes that attach prejudicial consequences to a prior event. In my opinion, the amendments to the *Wills Act* did not create a new obligation, or impose a new duty, or attach a new disability in respect of transactions or considerations already passed. The amendments here at issue simply changed the assumption from one of intention to benefit the former spouse to one that he or she does not.

[112] It is not a prejudicial consequence that the former spouse does not benefit. That result may be unfortunate or disappointing to the former spouse, but that may be exactly what the testator wanted to have happen. To put it another way, it could also be said that unfortunate or disappointing consequences occur from a failure to apply the law to circumstances as they exist on the date of death, since a former spouse would benefit to the detriment of the testator's children or other family members, which may also be exactly what the testator did not want to happen.

[113] To say that the presumption against retrospective operation of legislation applies here is to say that the testator and his former spouse had the right for the law to remain the same. No such right has ever been recognized. A few examples illustrate.

[114] In *Hasluck v. Pedley* (1874), L.R. 19 Eq. 271 the testator owned a considerable amount of personal and real property. The real property alone produced an annual income of £13,000. The personal property was disposed of by a residuary bequest. The testator's widow was entitled under the will to a yearly

rent of £4,500 generated by specifically named real property. The rent was to be paid quarterly, and was due three months after the testator's death.

[115] After the will, but before death, Parliament passed the *Apportionment Act*, 1870. One of the provisions of the *Act* made rent equivalent to interest on money lent so as to accrue from day-to-day. It was therefore of some importance how the rent was to be treated following death. Jessel M.R. concluded that all of the rents are to be apportioned as of the day of death, with that part falling into the residuary personal estate. He reasoned as follows (p. 273-74):

> ...It is said that testators make their wills on the supposition that the state of the law will not be altered; and it is contended that this will ought to be construed as it would have been under the old law. The answer to that is, that a testator who knows of an alteration in the law (as this testator must be presumed to have done), and does not choose to alter his will, must be taken to mean that his will shall take effect according to the new law.

[116] Similar conclusions were reached in *Constable v. Constable* (1879), 11 Ch.D. 681 and in *Capron v. Capron* (1874), 43 L.J. Ch. 477. In *Capron*, V.C. Malins said (p. 680):

> But I am bound to say there are some observations of the Lord Chancellor which seem rather to imply a doubt whether the Act of 1870 is to apply to wills already made, or made before the passing of the Act. There is, however, no decision on the subject, and therefore I cannot regard it as fettering my discretion in this case, and I think the true answer is this – that if the legislature had intended the Act not to apply to instruments already executed, they would probably have said so. But the words of the Act are very general; it takes effect from the time of its passing, and its general enactment in section 2 to my mind was clearly intended to apply to all instruments which, at all events should come into operation after the passing of the Act, and the will does come into operation after the passing of the Act, supposing the testator dies after it passed.

[117] In *Re Bridger*, [1894] 1 Ch.D. 297, a testator had bequeathed the residue of his estate to trustees in trust for his wife during her lifetime. On her death, he gave whatever could be given by law to a hospital, the remainder to his niece. After the execution of his will, but before his death, the legislature passed the *Mortmain and Charitable Uses Act*, 1891. This statute changed the law. Restrictions were removed from conveying real property to charities. The hospital was successful at trial in securing a ruling that it was entitled to the whole of the testator's estate.

The niece appealed. The Court of Appeal was unanimous in denying the niece any part of the testator's estate. The Act stipulated that it was to apply to the will of a testator dying after the passing of the Act. No mention was made of it applying or not applying to wills made prior to enactment.

[118] In a different context, in *West v. Gwyne*, [1911] 2 Ch.D. 1 (C.A.), Parliament enacted the *Conveyancing Act*, 1892. Section 3 provided that "in all leases" with a term against assigning or underletting the premises without consent, such consent, absent an express provision to the contrary, could not be withheld for payment of a fine. The appellants held a lease dated July 31, 1874 which had a term of 94 years. It provided that the lessees, executors, administrators and assigns could only underlet with express permission. The respondents in 1909 applied to underlet. The appellants said they would consent on payment of half of the surplus rent to be received by the lessees. The appellants claimed that since the lease was executed long before the 1892 amendment, it had no application, and they were free to exact a fine in return for their consent to the proposed underlet. The respondent lessees were successful at trial.

[119] On appeal, the English Court of Appeal was unanimous in dismissing the appeal. Cozens-Hardy M.R. wrote (p. 11):

> ...It was forcibly argued by Hr. Hughes that a statute is presumed not to have a retrospective operation unless the contrary appears by express language or by necessary implication. I assent to this general proposition, but I fail to appreciate its application to the present case. "Retrospective operation" is an inaccurate term. Almost every statute affects rights which would have been in existence but for the statute. Sect. 46 of the Settled Estates Act, 1877, above referred to, is a good example of this. Sect. 3 does not annul or make void any existing contract; it only provides that in the future, unless there is found an express provision authorizing it, there shall be no right to exact a fine. I doubt whether the power to refuse consent to an assignment except upon the terms of paying a fine can fairly be called a vested right or interest. ...

[120] Applying these principles here, Mrs. Hayward had no right to inherit under Mr. Hayward's will. Mr. Hayward is presumed to know the law. The law changed as of August 19, 2008. If he wanted Mrs. Hayward to be his executrix and sole beneficiary, he could have executed a testamentary document achieving that desire. He did not. The law did not change anything before its commencement. Applying the law in these circumstances does not give it retrospective effect.

[121] As already discussed, the amendments to the *Wills Act* that came into force on August 19, 2008 did not attach prejudicial consequences or a disability with respect to a prior event. It is well to remember that the amendments were part of a beneficial statute designed to ensure that Nova Scotians' testamentary wishes are better respected and capable of legal implementation. The legislature did so by making handwritten and signed wills valid despite non compliance with the long-standing formal and rather technical requirements for two attesting witnesses (s. 6 (2)); expanding the ability of a court to rely on informal writings or other documents to be a will, or change a will (s. 8A); by expanding the definition of when a member of Canada's military services can make a valid will (s. 9(2)(3); recognizing wills that are valid according to the law where they were made or where the testator habitually resided or his domicile of origin, are valid with respect to dispositions of real as well as personal property (s. 15); lastly, absent a contrary intention in specified documents, revoking a testator's bequest and appointment of a former spouse. I see no basis to delay these beneficial changes to the law by saying the legislature only intended the amendments to apply with respect to documents or events that are authored or happen after August 19, 2008. The legislature did not say so, and it would therefore be wrong to impute to it any such intention.

[122] I agree entirely with the conclusion of my colleague that the respondent had no vested right to entitlement under the will of her former spouse. She had no more than an expectancy. Mr. Hayward could change his will at any time up to the date of his death, provided he maintained the capacity to make a will. Therefore, the related but distinct presumption against legislation interfering with vested rights also has no application.

[123] At the outset of my reasons, I made the comment that my agreement the appeal should be allowed was reluctant. My concurrence in the result is not reluctant because I have any doubt about the legal correctness of the outcome. My reluctance arises because the evidence disclosed in the record before us belies the presumption created by the legislature that this will-maker did not intend to benefit his former spouse. A brief description of that evidence is all that is needed.

[124] Affidavits were filed by both the respondent and the appellant, and from friends of the deceased, Anne Fraser and Leroy Warner. From these materials, it is

uncontested that the testator and his former spouse remained on good terms after their divorce. The testator and the respondent met with a lawyer at the time of their separation agreement. The testator was aware that his will, as originally drafted, naming the respondent his executrix and sole primary beneficiary, would continue in full force and effect regardless of the divorce proceedings.

[125] Anne Fraser and Leroy Warner confirmed the testator's post divorce intention to benefit the respondent. The reason the testator was not concerned over naming the appellant as the primary beneficiary was that the appellant had already received a very substantial inheritance from the testator's mother.

[126] None of this evidence was referred to by the learned trial judge. I find no fault in this omission. There was no need to refer to it because the evidence was legally irrelevant to the issues the trial judge had to decide. Section 19A only allows for rebuttal of the statutory presumption that the testator intended to benefit his former spouse where the " contrary intention appears by the will or a separation agreement or marriage contract". There were no such documents in existence that demonstrated a contrary intention.

[127] The Alberta Law Reform Institute in *Effect of Divorce on Wills* (Report No. 72, 1994) discussed the pros and cons of permitting extrinsic evidence concerning a testator's actual intentions. The Institute noted the provisions of the *Uniform Wills Act* that an intention to benefit a former spouse must appear from the will itself. After referencing that this is the same conclusion reached by the majority of law reform agencies and legislators, the Institute adopted that recommendation (p. 23-25). This subject was revisited in its Report, *Wills and the Legal Effects of Changed Circumstances* (Final Report No. 98, 2010). The Institute changed its recommendation to one of allowing extrinsic evidence as to the testator's intention, and not just limiting the inquiry to language found in the will itself (p. 40).

[128] The appellant also has argued that the trial judge erred in not finding the separation agreement amounted to a writing demonstrating an intention to no longer benefit the respondent pursuant to s. 8A. Section 8A was also introduced by the same piece of legislation (S.N.S. 2006, c. 48). In light of my conclusion that s. 19A applies to the will of the deceased, it is not necessary to consider in detail the issue of s. 8A.

[129] In my opinion, s. 8A also became the law in Nova Scotia as of August 19, 2008. There is no reason documents written before that date are not to be given full force and effect under s. 8A. The trial judge appears to have assumed that to be the case. The only document relied upon by the appellant as possibly coming within the ambit of s. 8A was the separation agreement of June 28, 2004. The real issue was, did the separation agreement come within the terms of s. 8A as being a writing that embodied the testamentary intentions of the deceased or constituted the intention of the deceased to alter or revoke his prior will?

[130] I see no reversible error in the trial judge's decision on this issue. In my opinion, the determination of this issue involved a question of mixed fact and law. It is well understood that deference is owed to a trial judge on such questions. Absent an extricable error of law, the standard is palpable and overriding error. The burden was on the appellant to satisfy Justice Boudreau that the writing in issue (the separation agreement) embodied the testamentary intentions of the deceased, or the intention of the deceased to revoke or alter his will.

[131] The trial judge considered the wording of the separation agreement at pages 15 to 20 of his decision. Granted, this review was in relation to the appellant's argument that the separation agreement amounted to a waiver or renunciation by the respondent. But it does demonstrate an obvious awareness of the relevant provisions of the separation agreement.

[132] In post trial briefs, the appellant argued the separation agreement amounted to a writing within the meaning of s. 8A. With respect to this argument, Boudreau J. quoted in full the text of s. 8A. For ease of reference, I repeat the text of s. 8A:

> 8A Where a court of competent jurisdiction is satisfied that a writing embodies
>
> (a) the testamentary intentions of the deceased; or
>
> (b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,
>
> the court may, notwithstanding that the writing was not executed in compliance with the formal requirements imposed by this Act, order that the writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.

[133] Justice Boudreau then reasoned:

> [65] The separation agreement is "a writing" that was not executed in compliance with the formal requirements of the *Wills Act*. Michael Hayward says the separation agreement expressed an intention by his father to alter his "testamentary intentions," in that it "expressed testamentary intentions of George Hayward that the agreement was a final settlement between the Haywards." This would be a strained application of s. 8A, given that the separation agreement made no reference to Mr. Hayward's Will. I therefore find that s. 8A could not operate to revoke Mr. Hayward's Will.

[134] My colleague finds that the trial judge erred in law in his interpretation of s. 8A and by failing to consider whether the separation agreement satisfied that provision (para. 64). With respect, I am unable to agree. The trial judge referred to the provisions of s. 8A and the suggestion by the appellant that "the separation agreement expressed an intention to alter his testamentary intentions". Boudreau J. found that this would amount to a strained application of s. 8A given that the separation agreement made no reference to Mr. Hayward's will. In these circumstances, the trial judge said s. 8A could not operate to revoke Mr. Hayward's will. While it may have been better had the trial judge said s. 8A *did* not operate to revoke the will, I do not read the reasons by the trial judge as excluding the separation agreement from being able, in a general sense, from being a writing that might qualify under s. 8A solely because it did not mention a will. Nor do I see any failure by the trial judge to fully consider the terms of the separation agreement to see if it satisfied s. 8A. One might ask, how could he consider the terms of the separation agreement in light of s. 8A without referencing the fact the separation agreement made no mention of his previously expressed detailed testamentary intentions in his will?

[135] Furthermore, the trial judge also said:

> [69] Michael Hayward makes the concluding remark that "it is not the testamentary intention of George Hayward to benefit an ex-wife under his Will, but his intention to benefit his son, Michael Hayward." The problem with this bare assertion is that there is no evidence to support it. Under the Will, Michael Hayward is the residual beneficiary. For better or worse, the Will is the only available evidence of testamentary intention. **The Separation Agreement has already been found to be insufficient evidence of testamentary intention and ineffective to revoke George Hayward's Will.** [Emphasis added]

[136] My colleague points to no terms in the separation agreement that demonstrate any intention by the deceased to have the separation agreement viewed as constituting a testamentary intention by the deceased. Neither is there any mention of anything in the separation agreement that demonstrated an intention by the deceased to revoke or alter his testamentary dispositions. On this aspect of Justice Boudreau's decision, I would find no basis to interfere.

SUMMARY AND CONCLUSION

[137] The legislature chose to change the law with respect to wills in a number of respects. It elected to delay the commencement date until the Lt. Governor in Council proclaimed the legislation in force. Proclamation occurred on August 19, 2008. As of that date, the carefully considered amendments took effect. The law changed.

[138] Important to the issues in this appeal, the amendments reversed the previous presumption that a will-maker wanted to continue benefiting his or her spouse following a divorce. If that was not the case, the will-maker had to make a new will. A testator who was unaware, or delayed in taking such a step, would end up unintentionally benefiting his former spouse.

[139] As of August 19, 2008, the presumption became that a testator who had gone through a divorce did not want to benefit his former spouse. An appointment or gift to a former spouse could only take legal effect if the testator made his intention to do so known in his will, separation agreement or marriage contract. Otherwise the gift or appointment was revoked and the will would be interpreted as if the former spouse had predeceased the testator.

[140] The testator passed away on October 15, 2008. The law to be applied to his will is as of that date. On October 15, 2008 the law was the appointment and gift to his former spouse, the respondent, were revoked absent a contrary intention appearing in the will, or a separation agreement or marriage contract. There was no such contrary intention. Hence, the will must be interpreted as if the respondent had predeceased the testator. Applying the law as of October 15, 2008 is not giving the amendment retrospective operation. There is no presumption against retrospective operation to rebut.

[141] The law changed how the will would be interpreted, from what the law was before August 19, 2008, but neither the testator nor the beneficiary he named in his 1995 will had a right for the law not to change. The testator is presumed to know the law. Had he still wanted to benefit the respondent he was required to take some action to do so. Based on the evidence concerning the actual subjective intention of the deceased, it is unfortunate, but he did not take any action.

[142] I agree with the disposition of the appeal proposed by my esteemed colleague that the appointment in George Hayward's Will of Nancy Hayward as executor and the bequest to her of his estate are revoked and all other provisions of the will remain in full force and effect. I also agree that costs of both parties should be paid out of the estate on a solicitor-client basis.

Beveridge, J.A.

Concurring reasons for judgment of Fichaud, J.A.:

[143] I agree with Justice Oland's conclusion that the judge erred respecting s. 19A, and with her disposition of the appeal and costs. I agree with much of Justice Beveridge's reasoning on s. 19A. But I prefer a more direct path from s. 19A to the conclusion that this appeal should be allowed, and I would go further than my colleagues on s. 8A.

[144] The appeal turns on the interpretation of ss. 19A and 8A of the *Wills Act*, R.S.N.S. 1989, c. 505, added by S.N.S. 2006, c. 49, ss. 2 and 6, and, for the s. 8A submission, article 17.01 of the Separation Agreement. Those are issues of law that attract a correctness standard of review.

Section 19A

[145] Section 19A says:

> ... except where a contrary intention appears by the will or a separation agreement or marriage contract, ***where***, after the testator ***makes a will,*** the testator's ***marriage is terminated*** by a judgment absolute of divorce ...
>
> > (a) a devise or bequest of a beneficial interest in property to the testator's former spouse;
> >
> > ...
>
> ***are revoked*** and the will ***shall be construed*** as if the former spouse had predeceased the testator. [emphasis added]

[146] The only directives in s. 19A are that the devise or bequest be "revoked" and the will "shall be construed" as stated. Section 19A is about the construction of wills. The making of the will and the divorce are just conditions precedent to the directives. The only temporal imperative involving those conditions is that the will and divorce must exist *before* the will "shall be construed", not that the will and divorce must come into existence *after* s. 19A becomes law. The directives - "are revoked" and "shall be construed" - do not display a chequered legislative intent that, for an indefinite number of decades after s. 19A comes into force, some wills

shall be so construed and others not, depending on the date of the will's authorship in the distant past.

[147] A statute is always speaking, and statutory words in the present tense - such as "makes a will" and "marriage is terminated" - are applied to effectuate the statute's true intent: *Interpretation Act*, R.S.N.S. 1989, c. 235, s. 9(1).

[148] The only event that the Legislature intended must occur after s. 19A came into force on August 19, 2008, is the construction of the will. A will takes effect, and is construed, immediately before the testator's death: *Wills Act*, s. 23. As Mr. Hayward died on October 15, 2008, after s. 19A came into force, s. 19A applies.

[149] The rulings in *Re Matejka Estate*, [1984] B.C.J. No. 1645 (C.A.) (Q.L.) and *Page Estate v. Sachs*, [1993] O.J. No. 269 (C.A.) (Q.L.) are tangential to this appeal. The legislation of British Columbia and Ontario contained transitional directions that are absent from Nova Scotia's *Wills Act*. It is a precarious exercise to subtract that direction, leaving a residue, then draw guidance from a judicial interpretation of the whole.

[150] Much has been said in this case about the principles of construction for retroactive, retrospective and prospective legislation. The court's prime directive is to divine legislative intent, and the interpretive canons are just tools to that end.

[151] In *Épiciers Unis Métro-Richelieu Inc., division"Éconogros" v. Collin*, [2004] 3 S.C.R. 257, paras 46-48, Justice LeBel for the Court approved the definitions of retroactivity and retrospectivity in a passage authored by Professor Driedger:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Driedger's emphasis]

[152] Justice LeBel referred extensively to the third edition of Côté, Pierre-André, *The Interpretation of Legislation in Canada*, (Scarborough, Ont: Carswell, 2000).

Professor Côté's fourth edition, *The Interpretation of Legislation in Canada*, (Toronto, Ont: Carswell, 2011), at pp. 143-44, says:

> According to the case law, where a statute only modifies the future effects of a prior fact, it is not deemed to be retroactive. Its effect is characterized as prospective, since it changes rights, powers, obligations, and duties for the future only. Only the principle of non-interference with vested rights can be set up against such a statute's application. This was nicely expressed by Klebuc J. [*Co-operative Trust Co. of Canada v. Lozowchuk*, [1994] 4 W.W.R. 733 (S.Q.B.), p. 742] when he said that a retrospective law is, substantially, a law with prospective effect which affects vested rights.
>
> In practice, this means that while there is a strong presumption against retroactive effect, the presumption against retrospection is weaker. This is so because the presumption against retrospection converges with the presumption of non-interference with vested rights, which, as we have seen above, is relatively weak.

To the same effect: p. 136 of Professor Côté's 3rd edition.

[153] Section 19A does not change the application of the law before s. 19A came into force. It is not retroactive.

[154] Rather, s. 19A attaches legal consequences after it enters into force, to facts - the will and divorce - that came into existence before it was in force. This has been charted on an interpretive matrix as the "prospective" application of a "retrospective" law: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., (Markham, Ont: LexisNexis, 2008), at p. 673. Section 19A's directives operate prospectively, but its conditions precedent to the directives are factually retrospective. There is nothing counter-intuitive in the notion that separate aspects of a statutory provision may have different temporal perspectives. It is unnecessary to force a single label - "prospective" or "retrospective" - on s. 19A as a whole, and any semantic entanglement between those two adjectives is illusory.

[155] The enactment of future legal consequences to existing facts is standard fare for the Legislature. Unless there is a constitutional issue, and here there is none, it is not for the courts to second guess an intended policy choice that is enacted by statute.

[156] A change to the future legal effect of a prior vested right requires an unambiguous expression of legislative intent. But s. 19A does not affect a prior vested right. Mr. Hayward's Will was not a contract that gave Ms. Hayward legal rights from the date of signature. Until the testator's death, a will gives no vested right to a potential beneficiary. The will's author may change it as he pleases, or dispose of his property mentioned in the will, and the Legislature may alter the legal principles that affect the will's future construction. At Mr. Hayward's death, when the beneficiaries' rights vested, s. 19A already was law.

Section 8A

[157] Section 8A(b) says that where "a writing embodies ... the intention of the deceased to revoke, alter ... a will" the court may treat the writing as effective.

[158] Section 8A aims at the construction and implementation of a will or testamentary instrument, functions that are legally significant only upon the death of the testator. Section 8A came into force on August 19, 2008, before Mr. Hayward's death and the construction and implementation of his Will. Section 8A applies temporally to this case for the same reasons that s. 19A applies.

[159] Moving to the terms of s. 8A, clearly the Haywards' Separation Agreement was a "writing". The judge discounted s. 8A because its use "would be a strained application of s. 8A, given that the separation agreement made no reference to Mr. Hayward's Will".

[160] I respectfully disagree with the judge's interpretation.

[161] The Haywards' Separation Agreement of June 28, 2004 said:

> **RELEASE OF RIGHTS TO ESTATE**
>
> 17.01 The Husband and Wife each hereby ***release*** all rights which he or she might have under the laws of any jurisdiction to ***any share in the estate*** of the other or to the ***administration of the estate*** of the other, except as otherwise provided in this Agreement. [emphasis added]

[162] The "estate", in my view, includes a testamentary estate after death, meaning that the word connotes the Will. That is not a strained application. To the contrary, it is a cognitive challenge to dissociate a testamentary estate from the encompassing term "estate". It is the sharing and administration of Mr. Hayward's testamentary estate that Ms. Hayward sought in her motion. As the motions judge put it (2010 NSSC 6, para 7):

> Nancy Hayward has made application to have Michael Hayward removed and herself appointed as sole executor and declared sole beneficiary of her former husband's estate on the basis of the same 1995 Will.

[163] In June 2004, George and Nancy Hayward signed a document to eliminate any disposition from Mr. Hayward's testamentary estate to Ms. Hayward, despite that such a disposition had been directed by Mr. Hayward's 1995 Will. In my view, this "writing" expressed an intent to alter the effect of Mr. Hayward's Will under s. 8A(b). The enactment of s. 8A as of August 19, 2008, before Mr. Hayward died, gave future legal significance to that pre-existing fact for the construction of his 1995 Will and administration of his estate under that Will.

Conclusion

[164] In my view the judge erred in his interpretation and application of both ss. 19A and 8A and, in both respects, the appeal should be allowed. I agree with the disposition and costs as stated in the reasons of Justice Oland.

Fichaud, J.A.