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# From Planning to Problems: How Good Intentions Lead to Estate Disputes

**Estate Litigation Series 2025**

September 10, 2025

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## ▼ Overview

- Most common mistakes that trigger litigation
  - What are they?
  - What kind of litigation results?
  - Workarounds?
- Questions

## ▼ Top 5 Litigation Triggering Mistakes

- “Do it yourself” Wills
- Poor timing, incapacity and “undue influence”
- Unfair distribution
- Joint ownership planning
- Wrong Executor or Trustee



## Mistake No. 1 – “Do it yourself” Wills



### Beware of the “Simple Will”!

- Wills-kits and *pro formas* present risk
- Formal Requirements for Wills, Codicils and Holograph Wills
- Must meet legislated requirements to maintain “Dependants”
- Residency requirements for Personal Representatives

## ▼ What errors could you make?

- Failing to provide for those you must
- Failure to appoint an Executor and Alternate/s
- Failure to appoint a Guardian for Minor Children
- Failure to properly revoke earlier Will/s or Codicils
- Using ambiguous or unclear language

## ▼ Litigation Risks – Poorly-planned Wills

- Applications/ Trials for Proving the Formal Will
- If there are varying instructions/ competing Memoranda of Wishes, applications to validate handwritten instructions
- Applications/ Trials to interpret or construct the Will
- Applications to vary the Will for failure to make adequate provision for Dependents
- In some Provinces, applications to vary the Will where obvious beneficiaries are disinherited

## ▼ How to minimize litigation risk with a Will

- **Consult with an estate planning lawyer!**
- Ensure that your assets are fairly distributed
  - Consider a Statutory Declaration or Memorandum of Reasons
- Appoint an appropriate Executor or Personal Representative
- Identify a suitable Guardian for Minor Children
- Consider alternate planning options
  - Trusts
  - Joint ownership planning
  - Dual wills for private company shares

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**Mistake No. 2 –  
Poor timing,  
incapacity and  
“undue influence”**

## ▼ Don't wait, and don't let Mom and Dad wait, to draw up a will until it is too late!

- For a will to be valid, the person who executes it (“testator”) must have “testamentary capacity”, i.e. a “sound and disposing mind”.
- Means that testator:
  - Must understand the nature of the act and its effects
  - Must understand the extent of the property of which he is disposing
  - Must be able to comprehend and appreciate the claims to which he/she ought to give effect
  - No disorder of the mind must “poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties”

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## ▼ Cautionary tale: *W v. W Estate* (Ontario, 2015)

- Will left almost entire estate to second wife except for small amount to two of three sons from first marriage
- Deceased suffering from Parkinson's and Lewy Body Dementia (LBD)
- Held: capacity not proven. Reasons included:
  - Wife ignored lawyer's advice to get capacity assessment
  - LBD deprived testator of true appreciation of his overall financial position, and of the state of his relations with his sons
  - Arrangements in will “convoluted” and out of character
  - Executive and higher analytical functions compromised

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## ▼ Don't let yourself, or Mom and Dad be bullied!

- A will can be invalidated where it is shown to have been procured by “undue influence”
- Hard to prove
- Defined as “outright and overpowering coercion of the testator”
- Sometimes described as “an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean.”

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## ▼ Cautionary tale: *W v. W Estate* (cont.)

- Court also found that will, and an earlier property transfer, had been procured by the undue influence of the second wife
- Reasons included:
  - Second wife disliked sons from first marriage
  - Wife took testator to another lawyer after first lawyer recommended capacity assessment
  - Wife persuaded husband to transfer most of his wealth to her based on false statements that cost of his care were depleting her resources
  - Combination of cognitive decline and wife's undue influence deprived husband of true appreciation of his financial position or state of relations with sons

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## ▼ Litigation Risks

- Applications/trials for proving the validity/enforceability of the will
- Legal costs - which may ultimately be borne by either the challenger or the estate (if the challenge is reasonable/warranted)
- Delay in distribution of the Estate
- Family rancour

## ▼ How to avoid litigation

- Where there is doubt about capacity, secure a capacity assessment from a reputable professional
- Don't pressure the person making the will
- Where possible: discuss risks of undue influence openly and consider removing Mom/Dad from exposure to coercion



## Mistake No. 3 – Unfair distribution

 Don't cut out those whom you have a duty to support

- Canadian Provinces each have their own laws relating to the duty we all have to support family members
- Examples:
  - Ontario/Alberta
  - British Columbia

## ▼ Ontario: *Succession Law Reform Act*: “Support of Dependants”

- 58 (1) Where a deceased, whether testate or intestate, has not made **adequate provision** for the **proper support** of his **dependants** or any of them, the court, on application, may order that **such provision as it considers adequate** be made out of the estate of the deceased **for the proper support of the dependants** or any of them.
- “**Dependant**” is narrowly defined to mean spouse, parent, child or sibling of the deceased
  - “to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death”. Generally not adult children unless they are dependent

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## ▼ Ontario/Alberta (cont.)

- But where someone does qualify as a dependant, court will consider the adequacy of what is provided for them in will
- Assessment includes both legal and moral obligations, size of estate is relevant
- And must consider claims of all dependants
- “Adequate” means “sufficient to enable the dependant to live neither luxuriously nor miserably, but decently and comfortably according to his or her station in life”
- Where court finds adequate provision has not been met, has many remedies to choose from
- Discretionary and “not an exact science”

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## ▼ Ontario/Alberta- minimize risk of application for dependant support

- Consider potential claims of all those who qualify as dependants
- Consider factors courts look at in considering amount and duration of support for each dependant
- Consider preparing statement of reasons for dispositions under will

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## ▼ BC – *Wills Estates & Succession Act (WESA)*

- In British Columbia, the Court can vary or change Wills on the application of a disgruntled beneficiary
- Section 60 of the *WESA*:
  - **Maintenance from Estate**
    - “Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make **adequate provision** for the **proper maintenance and support** of the will-maker's **spouse or children**, the court may, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children.”

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## ▼ BC – WESA (cont.)

- Who has standing to vary the Will?
  - Spouse (legal and common law)
    - Can have multiple spouses
  - Children (natural and adopted)
    - Not step-children and *in loco parentis*
- *Tataryn v. Tataryn Estate* (SCC)
  - Test: Does the Will make “adequate provision for the proper maintenance and support” of the applicant and then, if the Will does not, the Court may order what it thinks to be “adequate, just and equitable”
  - Testamentary autonomy is deferred to only after legal and/or moral obligations

## ▼ BC – How to minimize variation risk?

- Ensure proper provision for spouse and children, considering the size of the Estate
- Treat children equally as much as possible
- If you choose to disinherit –
  - Must have **valid** and **rational** reasons
  - Prepare a Memorandum of Reasons or Statutory Declaration explaining exclusion or unequal division
- Consider alternative planning options



## Mistake No. 4 – Joint Ownership Planning



Be careful when Mom or Dad make you a joint account holder on their bank or investment accounts!

- Who is to become the owner of the assets in the joint account on Mom's or Dad's death—you or Mom's/Dad's estate?
- On death of one joint account holder, *legal* title to assets in joint account passes automatically to survivor
- But law says: when ageing parent transfers assets into joint accounts with an adult child, there is a *rebuttable presumption* that adult child is holding property *in trust* for ageing parent/ parent's estate after death of parent
  - This means that onus will be on transferee to demonstrate that a gift was intended
- Different when property passes between spouses or from parent to minor child—there is a rebuttable presumption of *advancement*

▼ Cautionary tale: *R Estate and M v. S*  
(Ontario, 2023)

- Mother had two daughters, B and P, who were co-estate trustees of mother's estate
- At time of death, mother had six accounts/GICs in joint names with P
  - Put into joint names three/four years before mother died
- P said joint accounts were hers, by right of survivorship, because that was mother's intention, by words and actions

▼ Cautionary tale: *R Estate and M v. S*  
(2023) (cont.)

- P relied on:
  - Signature cards indicating that account was joint with survivorship
  - Associated financial services agreements with the bank
  - Her own evidence of what she did for her parents
  - Fact the will said nothing about the joint accounts

## ▼ Cautionary tale: *R Estate and M v. S* (2023) (cont.)

- Court held: insufficient to rebut presumption of resulting trust:
  - The intention of the Deceased is a key consideration. But I am not persuaded that the reference to the financial services agreement assists [P] in this case. While the financial services agreement contains further explanation as to the meaning of “survivorship”, there is no evidence that the Deceased gave any real thought or attention to this explanation in the financial services agreements. They are very dense, and in the absence of evidence to the contrary it is improbable that she did so.

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## ▼ Cautionary tale: *R Estate and M v. S* (2023) (cont.)

- Court held that signature card indicating survivorship “is not enough”
- And even further explanation on bank documents will not change that
  - The Applicant submits, and I agree, that the key conclusion to be drawn from these cases is that a party seeking to rebut the presumption of resulting trust cannot rely on checking off a box, or other language in banking documents explaining survivorship. **There must be more evidence than this, to establish that the individual creating the joint account truly turned their mind to gifting a beneficial interest in the account.** Bank documents can speak to legal title, but they are not necessarily dispositive regarding equitable title of the accounts. In the present case, this type of further evidence just is not sufficiently present. [P] can point to banking documents, but there is no direct evidence of what was actually discussed when the Disputed Accounts were set up.

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▼ Lesson: document Mom's/Dad's intentions when setting up joint account!

- If intend to give assets in joint account to joint account holder on death, can do so in will/codicil or in contemporaneous statement of intention
- If intend assets in joint account to become an estate asset, can execute deed of trust
- Or don't set up joint account, but authorize adult child to act under power of attorney for property

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Mistake No. 5 –  
Wrong Executor  
or Trustee

## ▼ Beware the poorly chosen Executor!

- Estate's Personal Representative is fiduciary
  - Must administer the Estate according to Will
  - Significant responsibility
  - Has access to all Estate assets
- Family members are not always suitable
  - Conflict between siblings or in blended families
  - Joint appointments can result in deadlock
  - Lack of necessary skill or knowledge
  - Age may be a factor

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## ▼ Beware the poorly chosen Executor! (cont.)

- Non-resident Executors
  - If out-of-province – requirement to post a bond or get a waiver
  - If US Executor – residency issues of the Estate and associated tax implications (withholding tax? US tax compliance?)

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## ▼ What if you choose poorly?

- Notices of Dispute or Objection
- Application to remove or pass over Executor/ Trustee
- Litigation Costs
  - Can be extremely expensive because each Beneficiary and the Executor/ Trustee could have their own lawyer
  - Largely paid from Estate
- Effects on Estate administration
  - Nobody to administer Estate while dispute is pending
  - Administrator *Pendente Lite* may be required – additional cost
  - Distribution is held up for years

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## ▼ Mitigating Executor/ Trustee Disputes

- Only nominate someone capable of administering your Estate
- Avoid children/ family where conflict may arise
- Consider a tie-breaker in Will if multiple Executors
- Consider arm's-length Executor/ Trustee
  - Accountant or lawyer
  - Independent trustee or Trust Company
    - Statutorily regulated and Professional
    - Insured
    - Competitively priced

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# Pour-Over Clauses in Estate Planning

Key insights from Canada and the United States

*Presentation contribution by Anastasia Reklitis, Associate*



## Presentation Overview

- What are Pour-Over Clauses?
- The U.S. Experience
  - American Policy Considerations for Pour-Over Clauses
- Pouring Over into Canada
  - British Columbia
  - Nova Scotia
  - Ontario
  - Canadian Policy Considerations Against Pour-Over Clauses
- Should Pour-Over Clauses be Used?

## ▼ What is a Pour-Over Clause?

- A provision in a Will that directs the residue of the deceased's estate into an existing trust after death

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## ▼ The U.S. Experience

- Popular in the United States dating back to the 1950s due to increase in probate fees and costly procedures
- Courts in America had two fundamental issues with pour-over clauses
  - 1) Allow the testator to make a testamentary disposition in the future without following the formalities of creating a Will
  - 2) No certainty of actual distribution in the Will
- Courts attempted to fix the issue by invoking one of the two doctrines:
  - 1) Incorporation by Reference
  - 2) Facts of independent significance
- American states later enacted legislation to fix the issues inherent to pour-over clauses and have become a staple in American estate planning

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## Policy Considerations

- For Pour-Over Clauses

1. Continuity
2. Cost savings
3. Efficiency
4. Flexibility
5. Tax benefits
6. Certainty

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## Policy Considerations

- For Pour-Over Clauses

7. Control
8. Privacy
9. Simplicity
10. Protection
11. Stability
12. Choice of law

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## Pouring over into Canada

Unlike the U.S, Canadian courts have taken a different approaches and have not completely embraced pour-over clauses

### ▼ British Columbia – *Kellogg Estate v. Kellogg* 2013 BCCA 2292

- Pour-over clauses that attempt to incorporate amendments to a trust made after the execution of the Will is invalid under the *Wills Act*
- A trust incorporated by reference into a Will is valid only if it existed at the time of the Will's execution, it is clearly identified, and without future amendments

## ▼ British Columbia – *Quinn Estate*, 2018 BCSC 365

- Pour-over clause not cured by s. 58 of the Wills, Estates and Succession Act (WESA)
  - it addresses formal invalidity, and not substantive invalidity arising from avoiding execution requirements
- A pour-over clause to a revocable, amendable, inter vivos trust is invalid under Canadian jurisprudence
  - These types of trusts lack the “deliberate or fixed and final intention” required for testamentary dispositions

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## ▼ Nova Scotia – *MacCallum Estate*, 2022 NSSC 34

- The pour-over clause is valid; thus the executor is authorized to transfer the estate residue to the Trustee
- Pour-over clauses are valid where
  - The trust was fully constituted prior to the execution of the Will
  - The testator communicated the trust’s terms to the trustee
  - The trustee accepted the obligation
  - There was no amendment or revocation of the trust post-Will
  - The fiduciary duty of the trustee ensures the trust is administered per the testator’s intentions

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## ▼ Ontario – *Vilenski v Weinrib-Wolfman*, 2022 ONSC 211

The Court adopted reasoning from the B.C. cases *Waslenchuk Estate* and *Quinn Estate*

- Pour-over clauses which transfer estate residue to amendable or revocable trusts are invalid since they allow future testamentary dispositions without complying with formalities required by legislation
  - Rejected *MacCallum Estate* (Nova Scotia's approach)

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## ▼ Ontario – *Mio v. Bergvall et al*, 2025 ONSC 3919

Can s.21.1 of the Succession Law Reform Act (SLRA) validate a pour-over clause in Ontario?

- S.21.1 of the (SLRA) does not cure pour-over clauses in Ontario
  - S.21.1 operates on the assumption the disposition is valid under Ontario common law
  - It is not to override substantive legal rules but to cure technical defects.

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## Comparative Snapshot

Jurisdiction	Validity	Key Rule
Ontario	Invalid	Pour-over clauses to revocable/amendable trusts are substantively invalid; SLRA s.21.1 cures only formal defects
British Columbia	Invalid	Revocable/amendable trusts invalidate pour-over clauses; incorporation by reference and independent significance rejected
Nova Scotia	Sometimes Valid	Upheld if trust pre-existed, was fully constituted, and not amended/revoked after Will; fiduciary safeguards present
United States of America	Valid	Statutory acceptance and widely used

## Policy Considerations

- Why does Ontario and B.C. resist pour over clauses?
  - Violation of formalities for Wills
  - Uncertainty of distribution
  - Risk of fraud or abuse
  - Separation of testamentary and non-testamentary acts
  - Circumventing legislative scheme

## ▼ Should Pour-Over Clauses be used in Estate Planning in Ontario?

- Until the SLRA is amended to explicitly allow courts to validate pour-over clauses, compliance with strict formalities will likely override intentions of testator

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Questions?

## Survey and CPD QR Codes

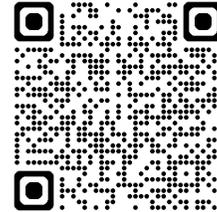
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British Columbia

The session has been loaded with the LSBC and is titled "From Planning to Problems: How Good Intentions Lead to Estate Disputes - September 10, 2025".

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# Biographies

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### Areas of Expertise

Commercial Litigation | Defamation & Media | Environmental | International Arbitration | Alternative Dispute Resolution | Product Liability | Wills, Trusts & Estate Litigation | Class Actions | Litigation and Dispute Resolution | Estate Planning | Construction Litigation | Occupational Health and Safety & Workers' Compensation Prevention Services | Intellectual Property | IP Litigation | Insurance | Construction Law | Aviation Law | Canada

### Education

1993, LLB, Dean's List, University of Alberta

1990, BA, University of Lethbridge

### Jurisdiction

Alberta, 1994

### Language

English

Alex Kotkas is Managing Partner of the Alberta Region, with primary responsibility for leadership of the Firm's Calgary and Tsuut'ina offices. As Regional Managing Partner, Alex manages the region's operations while developing and executing its strategic direction. His leadership focuses on cultivating a supportive environment that prioritizes exceptional client service, drives innovation, and nurtures outstanding talent.

Alex is the founder and former leader of the Firm's Litigation & Dispute Resolution group in Calgary. Alex is a seasoned litigator with extensive trial and appellate experience. He has appeared as litigation and arbitration counsel and as an advocate before a variety of statutory boards and tribunals, providing practical advice and outstanding advocacy in high stakes arbitration and litigation.

Alex is recognized for his success in handling high profile and media sensitive cases. Alex is ranked in *Best Lawyers* for Construction Law, Alternative Dispute Resolution, Corporate and Commercial Litigation, and International Arbitration (peer reviewed). He is also named by *Benchmark Canada* as a Litigation Star in Arbitration and Commercial Litigation in Alberta, and by *Chambers Global* for Dispute Resolution: Alberta (Canada). *Thomson Reuters* (formerly known as *Acritas*) independently rated Alex as a Stand-out Lawyer following their global survey of senior in-house counsel.

## Rankings and Awards

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- Recognized as Recommended in Commercial Litigation
- Recognized as a Thomson Reuters Stand-out Lawyer (formerly known as Acritas Star™ lawyer)
- Recognized in Corporate and Commercial Litigation in Alberta
- Recognized in International Arbitration in Alberta
- Recognized in Alberta as a Litigation Star in Arbitration and Commercial
- Recognized in Construction Law in Alberta
- Recognized in Alternative Dispute Resolution in Alberta
- Recognized in the Canadian Legal Lexpert Directory in Litigation - Corporate Commercial

## Memberships and Affiliations

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- Mentor, Canadian Bar Association Mentor Program
- Clerkship, Alberta Court of Appeal
- Member, Estate Planning Council of Canada
- Member, Law Society of Alberta
- Member, Calgary Bar Association
- Member, Canadian Bar Association
- Past Chair, Canadian Bar Association - Insurance Law Section

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### Areas of Expertise

Wills, Trusts & Estate Litigation | Personal Tax Planning & Wealth Management | Private Client Services | Estate Planning

### Education

2013, Certificate of Qualification, Federation of Law Societies of Canada

1999, LLB, University of Pretoria

1997, BLC, University of Pretoria

### Jurisdictions

British Columbia, 2014 | South Africa, 2000

### Languages

English | German | Afrikaans

Eric Clavier is a trusts and estate litigation lawyer in Fasken's Vancouver office, assisting clients with resolving contentious matters related to wills, trusts, undue influence and incapacity claims, committeeship applications, unjust enrichment claims, breach of fiduciary duties cases, abuse of powers of attorney claims, breach of trust claims, and passing of accounts.

Providing innovative solutions to disputes arising from estate planning, wills, trusts and personal documents, Eric's primary focus is to obtain speedy and efficient results for clients.

Prior to joining the firm in 2014, Eric was called to the South African bar in 2000 and practised as a barrister in the Republic of South Africa for 12 years. There he gained extensive trial and motion experience and appeared at all levels of court, including various appearances in the Supreme Court of Appeal of South Africa.

Eric formerly taught Trusts as an adjunct professor at UBC Peter A. Allard School of Law. Since January 2025, he now teaches Civil Procedure.

## Rankings and Awards

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- *The Best Lawyers in Canada 2024-2025* Recognized in Trusts and Estates in Vancouver

## Memberships and Affiliations

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- Past Chair, Canadian Bar Association Elder Law Section
- Past Co-Chair, Canadian Bar Association - BC Branch Elder Law Section
- Provincial Council Representative, Canadian Bar Association - BC Branch
- Member- at-Large, Canadian Bar Association - BC Branch Internationally Trained Lawyers Section
- Former President, Seniors First BC
- Member, Canadian Bar Association
- Member, Vancouver Bar Association
- Member, Canadian Bar Association - BC Branch
- Member, The Advocates' Society



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### Areas of Expertise

Litigation and Dispute Resolution | Real Estate Law |  
Product Liability | Wills, Trusts & Estate Litigation |  
Commercial Litigation | Real Estate | Insurance

### Education

1991, LLB, University of Western Ontario  
1984, BSc, Georgia Institute of Technology

### Jurisdiction

Ontario, 1993

### Language

English

Jonathan Lancaster's litigation practice is focused on corporate commercial litigation, commercial real estate litigation, lease arbitrations, banking law, product liability litigation, professional negligence and estate litigation.

Jonathan has a broad commercial real estate and estate litigation practice.

Acting successfully as counsel in Ontario cases, Jonathan has advised on a broad array of real estate litigation issues, including mortgagee and tenant rights/priorities, rights of first refusal, options to purchase, and equitable defences, vendors' liens, duties of condominium developers to purchasers, and restrictive covenants.

Jonathan has acted in a number of large product liability and professional negligence cases dealing with solicitors' and auditors' negligence, and has also advised on many complex estates matters.

Jonathan's practice is recognized by Chambers Global and Benchmark Canada.

## Rankings and Awards

- *Canadian Legal Lexpert Directory 2025* Recognized in the Canadian Legal Lexpert Directory as Repeatedly Recommended in Estate & Personal Tax Planning
- *The Best Lawyers in Canada 2022-2025* Recognized in Real Estate Law in Toronto

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- *The Best Lawyers in Canada* 2020-2025 Recognized in Alternative Dispute Resolution in Toronto
- *Benchmark Litigation Canada* 2017-2025 Recognized in Ontario as a Litigation Star in Commercial and Product Liability and Recall
- *The Best Lawyers in Canada* 2019-2025 Recognized in Trusts and Estates in Toronto
- *The Best Lawyers in Canada* 2015-2023 Recognized in Product Liability Law in Toronto
- *Lexpert* 2022 Recognized in the Canadian Legal Lexpert Directory in Litigation - Corporate Commercial
- *Canadian Legal Lexpert Directory* 2020-2021 Recognized in the Canadian Legal Lexpert Directory in Estate & Personal Tax Planning
- *Benchmark Canada* 2015 As "Provincial Litigation Star" in Ontario
- *Benchmark Canada* 2013-2014 As "Local Litigation Star" in Ontario
- *Chambers Global* 2012 Recognized for Dispute Resolution in Ontario
- *Benchmark Canada* 2012 As "Local Litigation Star" in Ontario and "Litigation Star" for Product Liability in Canada

## Memberships and Affiliations

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- Member, Canadian Bar Association
- Member, Ontario Bar Association
- Member, The Advocates' Society
- Lecturer, Law Society of Upper Canada

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