PART 1 – NATURE OF THE PROCEEDINGS AND OVERVIEW

Nature of the Proceedings

1. This case deals with the validity of a clear and unambiguous revocation clause in B R's (the deceased's) last Will and Testament (the 2006 Canadian Will).

2. The thrust of the Applicants' positions is that the revocation clause at issue should be eliminated or ignored.

3. The Applicants' Affidavits rely upon hearsay, self-serving hearsay and conclusions of law to establish intent. Surely such "evidence" cannot satisfy the heavy evidentiary burden to eliminate or ignore a clear and unambiguous revocation clause. I am relying upon non-hearsay evidence and documentary evidence. This evidence will clearly show that the 2006 Canadian Will executed by the deceased in Canada, both drafted and executed before her lawyer, and containing a clear and unambiguous revocation clause, is the last Will and Testament of the deceased, the only valid testamentary document, and governs her world-wide assets.

4. The Respondent has reviewed a copy of the 2006 Will. Apart from the specific bequest in favour of Dr. R for One Million Dollars, the remaining residue is equally distributed between the deceased's Spanish family and her Canadian family and friends. In fact, a perfect example of this balance is exemplified by the fact that the deceased, at the date of her death, had two surviving siblings. T R (the deceased's late husband) also had two surviving siblings at the date of the deceased's death. The deceased chose to include one of her siblings as a residual beneficiary in her final 2006 Will and excluded the other. Similarly, the deceased chose to include one of T R's siblings as a residual beneficiary in her final 2006 Will and excluded the other. So it would seem that the

deceased was quite sagacious with respect to keeping matters balanced in her final 2006 Will with the exception being the larger specific bequest to her friend Dr. R.

5. Prior to filing her Notices of Objection, the Respondent also reviewed the Affidavit evidence filed in support of the Applicants' positions. It appeared to the Respondent that the Affidavits contain little more than hearsay and conjecture statements as to the "evidence" of intent of B R and inadmissible conclusions of law. Ms. B's Affidavit, sworn in support of Mr. S's Application, does not mention that her opinion as to the intent of the deceased was based upon conversations she had had with the deceased several years ago. As such, in order to save unnecessary costs and time and given the strength of the documentary evidence and non-hearsay affidavit evidence which is contained in the Facts below, cross examinations on the self-serving hearsay and conjecture found in the Applicants' Affidavits would serve no useful evidentiary purpose before this Court.

6. What is truly at issue before this Court is the deceased's soliloquy, spoken in clear and unambiguous language, as expressed in her 2006 Canadian Will, her last Will and Testament.

7. Why are we here? The deceased executed a Spanish Will in 2002. The deceased subsequently executed a Canadian Will containing a clear and unambiguous revocation clause in 2005 as Mr. S has sworn in his filed Affidavit dated February 23, 2010 in response to Dr. R R's Application. The deceased executed another Canadian Will containing the same clear and unambiguous revocation clause in 2006. Mr. S, the drafter of both executed Canadian Wills only submitted the 2006 Canadian Will, the last Will and Testament, for probate in Ontario in 2007. In 2009, Mr. S brought his Application seeking to render inoperative the revocation clause contained in the 2006 probated Canadian Will in order that the Spanish Will be considered a valid testamentary document. Dr. R has brought his own Application in essence seeking the same relief.

8. As mentioned, non-hearsay affidavit evidence and documentary evidence will clearly prove before this Court that Mr. S has no basis upon which to form the foundation of his Application. Dr. R has commenced his parallel Application as a way of remaining in a UK flat to which he is not entitled at law or based on the facts in this case.

Overview of the Proceedings

9. On May 4, 2009, the Applicant, Mr. S, the estate trustee and solicitor for the estate of B R, filed an Application for advice and directions, along with an Affidavit in support, dated April 28, 2009, with respect to the interpretation of the valid Last Will and Testament of B R (the 2006 Canadian Will), in particular, whether the revocation clause contained therein revoked an earlier Spanish Will. If this was answered by the court in the negative, then Mr. S posed the question to the court as to whether both Wills could stand together and deal with separate assets.

10. The Respondent, felt compelled to oppose the Application once she had read an email contained in Mr. S's Application package from a UK solicitor for the Spanish beneficiaries. The UK solicitor informed Mr. S that it was his opinion and that of the UK probate court that the Canadian Will revokes the Spanish Will. It was the first time that the Responent realized this fact and contradicted what she had been advised by Mr. S in his initial letter to her 6 months after her stepmother had died. This letter, dated April 30, 2007 is included for your Honour's consideration (at paras. 40 and 41 below). The Respondent hired a lawyer in Toronto and on or about November 5, 2009, filed a Motion to Strike portions of S's Affidavit filed in support of his Application for Advice and Directions and repayment of pre-taken compensation by S.

11. On November 17, 2009, Justice Pollack ordered S to pass his accounts within 60 days and to make various inquires as to the deceased's world-wide properties.

12. By consent, on January 26, 2010, Justice F, upon being advised that Dr. R R intended to commence a "parallel" Application to Mr. S, ordered that the Applications of

Mr. S and Dr. R be heard together on April 20, 2010, along with the Respondent's motion to strike.

13. The Order of Justice F provided for a timeline of proceedings, including the timing of cross examinations and that Mr. S's application to pass his accounts be returnable on April 20, 2010.

14. Dr. R R filed a Notice of Application (to commence a "rectification application") on or about February 8, 2010. Dr. R's Affidavit in support is dated February 3, 2010. Mr. R's Application seeks an Order to "rectify" the 2006 Canadian Will to exclude the revocation clause contained in that Will and the necessary ancilliary Orders to correct the "improperly granted" Ontario probate.

15. The Respondent's council at the time, C B, filed and served a Responding Record on February 23, 2010. The Respondent then terminated her retainer of Ms. B as it was the first time she had ever needed to hire a litigator and became extremely frustrated by the participating litigators' consent to engage in unnecessary time and money-wasting back and forth arguments and motions, etc.

16. The Respondent now simply requests that this Honourable Court to make a determination that both the Applications of Mr. S and Dr. R be dismissed, as they are unsupportable both in fact and in law. As such, cross examination on the Affidavits submitted by Mr. S and Dr. R constitute a costly and unnecessary expense.

17. Further, the Respondent will not pursue her earlier motion to strike, or move to strike portions of the Affidavits of Mr. S or Dr. R, as she believes that the Court is much more capable than she in identifying that which is admissible affidavit evidence allowable under the Ontario *Rules of Court*, such as self-serving hearsay, and conclusions of law and admissible evidence in Wills interpretation matters.

18. Further, the Respondent does not intend to pursue the matter of Mr. S's accounts, including his pre-taking, until such time as a decision is rendered with respect to these Applications.

19. Lastly, on the issue of costs, the Respondent seeks a simple adjudication on the facts already contained in filed documentary and affidavit evidence of the Applicants. Her objection to Mr. S's Application is entirely reasonable based on the facts contained in the filed evidence and as set out in the Facts below. Further, Mr. S waited 3.5 years after the testator died to seek advice and direction with respect to B R's last will and testament, and after all the monies had been drained from the estate account. Despite his position that both the invalid Spanish Will and the Canadian Will stand together, and despite the fact he handled distribution of the estate as if both Wills were valid, he nonetheless failed to send both Wills to probate in Ontario. Furthermore, this Application was unnecessary for an executor/estate solicitor to take on, as the final 2006 Will was clear in its language and properly executed. It was therefore not proper for the executor/estate solicitor to take a particular position and disperse the estate based on hearsay and inadmissible evidence to the detriment of some of the beneficiaries. Rather, Mr. S should have properly advised all of the beneficiaries of their rights under the valid 2006 Canadian Will and advised them to seek independent legal advice, if they chose to do so, in this matter. S should therefore be responsible for covering this Respondent's costs.

PART II - THE FACTS

20. On or about June 7, 2002, the deceased, B R, executed a Spanish Will in Spain.

> *Responding Record of S to the Application of Dr. R, Exhibits "F" and "G" to S's Affidavit sworn April 28, 2009* (attached as Schedule C)

21. The 2002 Spanish Will contained a provision recognizing that she had a previously executed Canadian Will. The translated provision reads as follows:

> "The testator states that she drafted another Will in Canada for property outside Europe, all parts of which are to survive, its contents ratified, and hereby revokes all wills drawn up prior to this one, with respect to property owned by her in Europe."
>
> *Responding Record of S to the Application of Dr. R, Exhibit "G" to S's Affidavit sworn April 28, 2009* (attached as Schedule C)

22. On June 18, 2005, T R, B R's legal husband of the past 35 years died. Mr. R had been ill and was a dependent in a nursing home for many years. B R remained married and devoted to him up until the time of his death on June 18, 2005.

23. Shortly after T R died, B R instructed Mr. S to draft a new Canadian Will.

> *Responding Record of S to the Application of Dr. R, S's Affidavit sworn April 28, 2009, paras. 6,7 and the Exhibits "B" and "C" referred to therein* (attached as Schedule D)
>
> *Responding Record of S to the Application of Dr. R, S's Affidavit, sworn February 23, 2010, paras. 4, 5* (attached as Schedule E)

24. This 2005 Canadian Will was prepared in accordance with the deceased's instructions and executed by the deceased on September 16, 2005.

> *Responding Record of S to the Application of Dr. R, S's Affidavit, sworn February 23, 2010, para. 6* (attached as Schedule E)

25. Mr. S has only produced an unexecuted copy of the 2005 Will.

Responding Record of S to the Application of Dr. R, S's Affidavit, sworn February 23, 2010, Exhibit "B" (attached as Schedule F)

26. This 2005 Will contained the following revocation clause:

"1. I HEREBY REVOKE all Wills and other testamentary dispositions of every nature or kind whatsoever by me heretofore made."

Responding Record of S to the Application of Dr. R, S's Affidavit, sworn February 23, 2010, Exhibit "B" (attached as Schedule F)

27. The 2005 Will also contained the following provision:

"3. I GIVE, DEVISE AND BEQUEATH all my property of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment…"

Responding Record of S to the Application of Dr. R, S's Affidavit, sworn February 23, 2010, Exhibit "B" (attached as Schedule F)

28. On August 22, 2006, the deceased attended the office of Mr. S. Mr. S went over each and every clause in the 2005 Canadian Will with her. The deceased then asked to see the Will, which she read.

Responding Record of S to the Application of Dr. R, S's Affidavit, sworn April 28, 2009, para. 9 (attached as Schedule D)

29. On August 22, 2006, after reviewing and reading the 2005 Will, the deceased instructed Mr. S to draft another Canadian Will.

Responding Record of S to the Application of Dr. R, S's Affidavit, sworn April 28, 2009, para. 9 (attached as Schedule D)

30. This new 2006 Will is identical in every respect to the Canadian Will drafted by Mr. S and executed on September 16, 2005, with the exception being the inclusion of a specific bequest clause which reads:

"(c) To give to my friend, **R R**, the sum of **ONE MILLION DOLLARS (CDN $1,000,000.00)** for his own use absolutely

Responding Record of S to the Application of Dr. R, S's Affidavit, sworn April 28, 2009, para. 10 and Exhibit "A" (attached as Schedules D and G)

Responding Record of S to the Application of Dr. R, S's Affidavit, sworn February 23, 2010, para. 7 (attached as Schedule E)

31. One day after being explained and reading the provisions of the identical 2005 Will (with the exception of the specific bequest in favour of Dr. R), the deceased executed this new Canadian Will on August 23, 2006.

Responding Record of S to the Application of Dr. R, S's Affidavit, sworn April 28, 2009, Exhibit "A" (attached as Schedule G)

32. Apart from the specific bequest to Dr. R in the amount of ONE MILLION DOLLARS, both of the executed Canadian Wills provide for a residue distribution that is balanced, percentage-wise, as between the deceased's Spanish and Canadian families. This "balance" is also exemplified by the fact that, at the date of death of B R, both she and her late husband T R, each had two surviving siblings. B R's Canadian Wills include one of her siblings while excluding the other. Similarly, the Wills include one of T R's siblings while excluding the other.

Responding Record of S to the Application of Dr. R S's Affidavit, sworn April 28, 2009, Exhibit "A" (attached as Schedule G)

33. On October 7, 2006, B R died.

34. It is evident that by February 26, 2007, Mr. S was in receipt of the Spanish Will. By letter dated February 26, 2007, Mr. S told I F that he had had the Spanish Will translated and said this:

> "After reading this [Spanish] will several times, I am convinced that the intention of B when she instructed me to draw up her wills – the first one in 2005, and the second one in 2006, that these wills were **only** to cover her Canadian assets and that the Spanish will was to cover her European assets.
> …
> To summarize, the Spanish will shall deal with the European assets of B and I shall no longer be involved in that part of the estate…"

Responding Record of K R, dated February 23, 2010, docs. #83, 84 (attached as Schedule H)

35. On March 1, 2007, S met with counsel for Dr. R, M O S.

Responding Record of K R to the Application of Dr. R, dated February 23, 2010, doc. #86, 89, 90 (attached as Schedule I)

36. On or about March 2, 2007, Mr. S had a detailed conversation with Ms. B. Mr. S's notes of this conversation say that Ms. B's current opinion of B's intent is based upon conversations that she had had with the deceased "several years ago."

Responding Record of K R to the Application of Dr. R, dated February 23, 2010, doc. #88 (attached as Schedule J)

37. However, neither Mr. S nor Ms. B, in their sworn Affidavits, have said that Ms. B's opinion as to the deceased's intent is based upon conversations Ms. B had had with the deceased "several years ago".

> *Responding Record of S to the Application of Dr. R, S's Affidavit, sworn April 28, 2009, para. 17* (attached as Schedule D)
> *Application Record of S to his own Application, B Affidavit, sworn April 28, 2009, TAB 3, para. 2* (attached as Schedule K)

38. On March 29, 2009, Ms. O S sent Mr. S a letter by email asking, amongst other matters, how Mr. S intended "to deal with the issues relating to the Ontario will and the Spanish will. You advised it is your position the Ontario will should only cover Mrs. R's Canadian assets and that her assets in Europe should be governed by her Spanish will. You said you were going to give the matter some thought and consider the best approach, including possibly seeking beneficiary consent to the above, if appropriate."

> *Responding Record of K R to the Application of Dr. R, dated February 23, 2010, docs. #89, 90* (attached as Schedule I)

39. By letter dated March 30, 2007, sent in response to O S's letter of March 29, 2007, Mr. S replied:

> "My intention is that when I forward the requisite Notices to the beneficiaries together with the Canadian Will, I shall also forward to these beneficiaries the Spanish Will and advise them that the position I am taking as both solicitor and estate trustee for the estate of B R is that the Canadian Will governs Canadian assets and that the Spanish Will governs European assets…
>
> If any of the beneficiaries challenge my interpretation, I shall seek counsel and have a judge decide the matter…"

Responding Record of K R to the Application of Dr. R, dated February 23, 2010, doc. #91, 92 (attached as Schedule L)

40. On or about April 30, 2007, Mr. S sent K R a reporting letter, along with a copy of the 2002 Spanish Will and a copy of the 2006 Canadian Will. In the reporting letter, Mr. S advised K R that the 2006 Canadian Will, dated August 23, 2006, revoked the 2005 Canadian Will.

Responding Record of K R to the Application of Dr. R, dated February 23, 2010, doc. #93 (at para. 4), 94 (attached as Schedule M)

41. Mr. S's reporting letter to K R of April 30, 2007, also expressed Mr. S's legal opinion that the two Wills (the Spanish Will and the 2006 Canadian Will) stood together. Mr. S made no mention that the 2006 Canadian Will revoked the Spanish Will nor did he inform me of any potential rights that K R had to the deceased's world-wide assets or that K R should seek independent counsel's advice regarding Mr. S's interpretation/advice. Mr. S only said, in this cover letter, with respect to this issue:

"I am the solicitor and the estate trustee for the estate of B Esther R who died on October 7, 2006 in Spain…

…I am convinced that B's intention was that the Canadian will only govern her Canadian assets and that the Spanish will only govern her European assets, in fact, the Spanish will specifically states that it governs B's European assets."

Responding Record of K R to the Application of Dr. R, dated February 23, 2010, doc. #93, 94 (attached as Schedule M)

42. Mr. S dealt with the estate as if there were two valid Wills (Canadian and Spanish). And yet, Mr. S did **not** submit the revoked Spanish Will for probate in Ontario.

Responding Record of K R to the Application of Dr. R, dated February 23, 2010, doc. #114, 115 (attached as Schedule N)

43. Mr. S only submitted the valid 2006 Canadian Will for probate in Ontario on or about May 1, 2007.

Responding Record of K R to the Application of Dr. R, dated February 23, 2010, doc. #114, 115 (attached as Schedule N)

44. A Certificate of Appointment of Estate Trustee with a Will was issued to Mr. S with respect to the valid 2006 Canadian Will on June 11, 2007.

Responding Record of S to the Application of Dr. R, S's Affidavit, sworn April 28, 2009, para. 11 (attached as Schedule D)

45. Mr. S assisted the European beneficiaries under the invalid Spanish Will to realize on the European assets. The European assets include, but may not be limited to, Spanish real estate, Spanish bank accounts and a UK flat in which Dr. R currently resides.

Responding Record of K R to the Application of Dr. R, dated February 23, 2010, Docs. #102, 109 (attached as Schedule O)

46. Mr. M B, a UK solicitor for the Spanish beneficiaries, submitted both the revoked 2002 Spanish Will and the valid 2006 Canadian Will to the UK Probate Court. Mr. B emailed Mr. S on January 14, 2009, and informed him that the UK Probate Court had rejected the Spanish Will, because the 2006 Canadian Will revoked the prior Spanish Will, and they would only admit to probate the Canadian Will.

> "I have heard from the UK Probate Court, who have confirmed what I had already believed…as far as UK Law is concerned, the Canadian Will has, in fact, revoked the prior Spanish Will and the UK Probate authorities will only admit to Probate the Canadian Will. As such their view would be that the assets held in the UK should be distributed in accordance with the terms of the Canadian Will, not the Spanish Will."
>
> *Responding Record of S to the Application of Dr. R, S's Affidavit, sworn April 28, 2009, Exhibit "H" AND ALSO FOUND IN Responding Record of K R to the Application of Dr. R, dated February 23, 2010, doc. #107* (attached as Schedule P)

47. In consequence to the UK solicitor's email, Mr. S, on behalf of the European beneficiaries and at the detriment and expense of the Canadian beneficiaries, is now bringing an Application for advice and direction.

48. When K R was served Mr. S's Application for Advice and Direction in May 2009, she then discovered through the reading of Mr. B's emailed opinion and reporting of the UK Court's rejection of the revoked Spanish Will, that she may have been misled by Mr. S. She therefore felt compelled to have this matter remedied by filing a Notice of Objection to Mr. S's Application.

49. Mr. S now seeks by this Application, and more than three years after deciding himself <u>not</u> to submit both the invalid Spanish and 2006 Canadian Wills for probate in Ontario, failing to advise or inform K R of her rights to the European assets, failing to advise or inform K R that the Canadian Will revoked the Spanish Will, and after the Estate has been drained, court approval of his interpretation.

> *Responding Record of K R to the Application of Dr. R, dated February 23, 2010, docs. #109, 110, 112, 113* (attached as Schedule Q)

50. The strength of the revocation clause contained in the Canadian Wills that Mr. S drafted must surely explain why Mr. S would not have submitted the Spanish Will for probate in Ontario. As counsel who has many years of related experience at the bar, Mr. S must have realized that the Spanish Will was revoked by the subsequent Canadian Wills which both contained clear and unambiguous revocation clauses, and therefore the Spanish Will would be rejected as a testamentary document in Ontario. Indeed, this is exactly what occurred in the UK Probate Court.

51. Nonetheless, Mr. S is trying to have the court, *ex post facto*, justify or rubber stamp his improper handling of B R's estate relying upon my ignorance of my rights under the valid Canadian Will. His application constitutes little more than a "Hail Mary" at considerable emotional and financial expense to K R.

PART III – ISSUE

Does the 2006 Canadian Will, the last Will and Testament of the deceased, which contains a clear and unambiguous revocation clause, revoke the earlier Spanish Will?

PART IV – THE LAW

Does the 2006 Canadian Will, the last Will and Testament of the deceased, which contains a clear and unambiguous revocation clause, revoke the earlier Spanish Will?

52. Essentially, both the Applications of Mr. S and the Mr. R seek to have the revocation clause contained in the 2006 Canadian Will rendered inoperative.

53. As a preliminary note, Mr. R's application is for "rectification" of the 2006 Canadian Will to exclude the revocation clause. The Respondent wonders if "rectification" is even possible, given that the 2006 Will has already been probated in Ontario and the estate fully administered. Mr. S has sworn it is his understanding that, as the Certificate of Appointment has already been granted, the 2006 Canadian Will cannot be rectified.

> *Responding Record of S to the Application of Dr. R, S's Affidavit, sworn April 28, 2009, para. 18* (attached as Schedule D)

54. The identical revocation clause found in both of the 2005 and 2006 Canadian Wills is clear and unambiguous. It is unequivocal. It was drafted by Mr. S, the deceased's solicitor.

55. The revocation clause reads as follows:

> "1. I HEREBY REVOKE all Wills and other testamentary dispositions of every nature or kind whatsoever by me heretofore made."

56. Mr. S has sworn that he went over each and every clause of the 2005 Canadian Will with the deceased (and that, except for the specific bequest in favour of Dr. R, the 2005 Will is identical to the 2006 Will). The deceased then asked to see the 2005 Will, which she then read.

> *Responding Record of S to the Application of Dr. R, S's Affidavit, sworn April 28, 2009, para. 9* (attached as Schedule D)

57. "In issues of probate, the burden of establishing that an express revocation clause is inoperative…is a heavy one. For example, if the testator has read the will or if it has been read to the testator, it is difficult to contradict an express revocation clause."

> *Feeney's Canadian Law of Wills,* Fourth Edition, looseleaf (LexisNexis), at 5.24

58. "It is a heavy burden upon a plaintiff who comes into this Court to say: 'I agree that the testator was in every way fit to make a will, I agree that the will which he has made is perfectly clear and unambiguous in its terms, I agree that it contains a revocatory clause in simple words: nevertheless I say that he did not really intend to revoke the earlier bequests in earlier wills.' Quite obviously the burden must be heavy upon anybody who comes to assert a proposition of that kind."

> *McCarthy v. Fawcett* 1944 CarswellBC 3 (S.C.) para. 28, quoting Langton, J. in *Lowthorpe-Lutwidge v. Lowthorpe-Lutwidge*, [1935] P. 151, at pp. 156; aff'd 1944 CarswellBC 82 (C.A.)

59. Neither Mr. S nor Mr. R have met this heavy burden. The unequivocal facts are as follows:

- both Canadian Wills were drafted by the deceased's solicitor,
- the revocation clauses are clear and unambiguous,
- the deceased was a very astute businessperson who has accumulated a fairly sizeable estate,
- there is no issue raised as to her not ever being of sound mind,

- each and every clause of the 2005 Canadian Will, which is identical in every respect (except for the specific bequest in favour of Dr. R in the amount of One Million Dollars) to the 2006 Will was explained to the deceased by the deceased's solicitor, the drafter of the Will,

- the deceased, subsequent to this explanation, then asked to see the 2005 Will which she then read,

- the very next day, the deceased executed her 2006 Will,

- it would seem that the deceased gave her 2006 Will considerable thought. She added a specific bequest to her long time friend, Dr. R. The Will is also **balanced**. This is shown by the fact that the estate residue is equally distributed between her Spanish family and her Canadian family and friends. It is also shown by the fact that the deceased, at the date of her death, had two surviving siblings. T R (the deceased late husband) also had two surviving siblings at the date of the deceased death. B R chose to include one of her siblings as a residual beneficiary in her final 2006 Will and exclude the other. Similarly, the deceased chose to include one of T R's siblings as a residual beneficiary in her final 2006 Will and exclude the other.

- all of the deceased's property is covered by the Will

60. Further, the Affidavit "evidence" of intent filed by both Applicants is both hearsay and self-serving hearsay (not to mention some conclusions of law as well). Self-serving hearsay statements should be accorded no weight in wills interpretive matters.

Thomann v. Armgardt Estate 2003 CarswellOnt 899 (C.A.)

61. Further, the affidavits of both Mr. S, sworn April 28, 2009, and Ms. B, fail to mention that Ms. B's formulation of the deceased's "evidence" of intent is based upon conversations that Ms. B had had with the deceased several years ago.

> *Responding Record of S to the Application of Dr. R, S's Affidavit, sworn April 28, 2009, para. 17* (attached as Schedule D)
> *Application Record of S to his own Application, B Affidavit sworn April 28, 2009, TAB 3, para. 2* (attached as Schedule K)

62. As to the Affidavits of Mr. S and the sworn Affidavit of Ms. B referred to in para. 61 above, both Mr. S (at para. 19) and Ms. B (at para. 4) have said what they believe B R's intentions were. In this regard, I note the following quote from *Feeney's, supra*:

> It seems clear…that evidence of third parties, even evidence of persons who draft wills, regarding the will-maker's intentions are inadmissible: *Re Pladsen Estate* (1990), 84 Sask R. 35 (Surr. Ct.)
>
> *Feeney's Canadian Law of Wills,* Fourth Edition, looseleaf (LexisNexis), at 10.26 (footnote)

63. Further, Mr. S's Application is premised on his assertion that the deceased was **twice** post-Spanish Will execution in error as to the effect of a revocation clause. To suggest that this very intelligent, sophisticated, and strong businesswoman **twice** did not appreciate the legal effect of a revocation clause is not a credible argument. To say that she executed a Will she did not approve of is truly nonsensical. What does this mean and what part of the Will did she not approve?

64. Additionally, Mr. S seems to be engaging in selective applications of a revocation clause. He told the Respondent in his reporting letter of April 30, 2007 (discussed above at paras. 40-41) that the 2006 Canadian Will revoked the earlier 2005 Canadian Will. And yet, in this Application, he argues that the revocation clause has no application to an

even earlier Spanish Will. Either a revocation clause is valid or it is not. By Mr. S's own words to me, the revocation clause in the 2006 Canadian Will is operative.

65. Lastly, leaving the issue of the existence of the 2005 Canadian Will aside, the Spanish and 2006 Canadian Wills cannot both stand because the residual beneficiaries in the 2006 Canadian Will, the deceased's last Will and Testament, are entitled to a percentage residue of the deceased's entire remaining estate. Clause 3 of the 2006 Canadian Will states:

> 3. I GIVE, DEVISE AND BEQUEATH all my property of every nature and kind and wheresoever situate…
>
> (d) To divide the rest and residue of my estate into five equal shares…
>
> *Responding Record of S to the Application of Dr. R S's Affidavit, sworn April 28, 2009, Exhibit "A"* (attached as Schedule G)

66. As such, the Spanish Will and the Canadian Wills are clearly inconsistent. The 2006 Canadian Will, by its clear and unambiguous language, includes and subsumes the assets referred to in the Spanish Will. As a finding of consistency is critical for both Wills to stand individually, they cannot do so in this case.

> *Re Kumar Estate* 2002 CarswellNS 125 (Prob. Ct.)
> *Re Lawer Estate* 1986 CarswellSask 219 (Surr. Ct.)

PART V – RELIEF SOUGHT

67. That the Applications of both Mr. S and Mr. R be dismissed in their entirety.

68. Costs incurred to respond to these Applications.

ALL OF WHICH IS RESPECTFULLY SUBMITTED