Modernizing Requirements for Bonding of Estate Trustees

Date: April 2012

Submitted to: Ministry of the Attorney General

Submitted by: the Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

Table of Contents

Introduction

In the spring of 2010, the OBA and the Ministry of the Attorney General ("MAG") exchanged correspondence on Ontario's bonding requirements for estate trustees. MAG has asked for clarification of some of the points in the OBA's initial submission (dated April 14, 2010 and attached to this submission). In order to ensure the currency of the OBA's initial submission and provide the necessary clarifications, we have both summarized the initial submission and answered the specific questions raised by MAG.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing nearly 18,000 lawyers, judges, law professors and law students in Ontario. OBA members practice law in no fewer than 37 different sectors. In addition to providing legal education for its members, the OBA has assisted government and other policy makers with countless policy initiatives - both in the interest of the legal profession and in the interest of the public.

Our Trusts and Estates practice section has over 800 members, including the leading experts in the field. These members collectively represent every stakeholder in the administration of estates, including testators, beneficiaries of testate and intestate estates, and corporate and individual trustees. While this submission was formulated by our Trusts and Estates Section, it has had the benefit of review by all 37 of our practice areas.

The Rationale for Modernization of Bonding Requirements

The principal reasons for making the recommended changes to the trustee bonding requirements are:

1. The current bonding requirements create a regulatory burden beyond what is necessary to achieve the policy objective of protecting beneficiaries. Bonding requirements need to be more tailored to achieving this objective and need to embody a better recognition of the multi-cultural make-up of the province;

2. In the best case scenario, the existing requirements add unnecessary expense and delay to the administration of estates particularly given the very limited number of institutions that are willing to provide estate bonds. In some cases, the requirements make administration of the estate ***impossible***[1]; and

[1] We understand that the Office of the Children's Lawyer frequently sees cases in which no one will apply for a Certificate of Appointment because an estate trustee bond cannot be obtained; that office has no statutory jurisdiction to administer estates. The Office of the Public Guardian and Trustee has the statutory jurisdiction to administer estates but we understand that office does not view the unavailability of a bond as sufficient

3. Codifying additional circumstances in which a bond is not necessary would reduce or eliminate the need for motions to dispense with bonding requirements, thus freeing up judicial resources for other work, improving the efficiency of the administration of justice and assisting in cost containment measures that have become crucial.

Recommended Changes

While the recommended changes are outlined in greater detail in the original submission and clarified in the answers below, the crux of the recommendations are two-fold:

(1) Eliminate the general bonding requirement that currently applies to all estate trustees not named in a will (whether acting on an intestacy or with a will that does not name them); and

(2) Codify more practical exceptions to the boding requirement for estate trustees who are not resident in Ontario.

(1) Elimination of the General Bonding Requirement for Trustees not named in a Will

The General Bonding requirement for those trustees not named in a will is outlined in section 35 of the Estates Act, which provides:

> Except where otherwise provided by law, every person to whom a grant of administration, including administration with the will annexed, is committed shall give a bond to the judge of the court by which the grant is made, to enure for the benefit of the Accountant of the Superior Court of Justice, with a surety or sureties as may be required by the judge, conditioned for the due collecting, getting in, administering and accounting for the property of the deceased, and the bond shall be in the form

---

reason for it to apply for a Certificate unless there is no will and there are no next of kin residing in the Province of Ontario. In addition, even the limited number of companies that continue to provide bonds generally restrict them to Canadian or U.S. residents.

> prescribed by the rules of court, and in cases not provided for by the rules, the bond shall be in such form as the judge by special order may direct.

Jurisdictions with similar legal systems, including similar laws of fiduciary duty, have eliminated this general requirement. The United Kingdom, for example, no longer requires the posting of a bond.

Given that all those who are appointed to act as trustee in these circumstances must reside in Ontario and given the clear remedies for breach of fiduciary duty, there is little or no policy justification for requiring the additional expense and regulatory burden of requiring either a bond or a motion to dispense with the bond. This is an unnecessary cost to beneficiaries and the justice system.

Where there are vulnerable beneficiaries, such as minors or other incapable persons, a bond can still be required. Also, in order to cover other case specific scenarios of concern to beneficiaries, amended legislation could provide the court with discretion to require the posting of a bond in specified circumstances, where requested by the beneficiaries or creditors.

(2) More practical exceptions to Bonding for Non-Residents named in a Will

Currently, where a non-resident of Ontario or the Commonwealth is named in acting as an estate trustee by virtue of being named in the will, a bond is required. The mobility between Canada and the United States means trustees for Ontario residents are as, or more, likely to be American residents than residents of commonwealth jurisdictions like Australia. More importantly, given the multi-cultural make-up of Ontario, and immigration from non-commonwealth countries in Asia and Africa, for example, it is more and more likely that family members who are chosen to act as trustees will not be from the commonwealth. The latter circumstance creates a particular problem in that most institutions will not bond non-residents who are not American residents. Where there are no special circumstances such as incapable persons and minors, there is no reason why choosing a trusted family member from outside the commonwealth should create undue expense and delay for one's beneficiaries.

It is recommended that, where there is at least one trustee who is resident in Ontario, there should be no bonding requirement for a co-trustee who is a non-resident of Ontario or the commonwealth. This will allow a trusted family member to be chosen by a testator or a court as long as there is also an Ontario trustee. Given the law of fiduciary duty combined with joint and several liability, the

existence of an Ontario co-trustee will negate the enforceability concerns that may exist with a non-resident trustee.

The chart below reflects what the overall bonding scheme would look like with the recommended changes implemented.

Derivation of status	**Residency and Beneficiary Circumstances**	**Bond/No Bond Per Estate Trustee**
Any estate trustee named in will	Resident Commonwealth Regardless of who are beneficiaries	No bond
Sole estate trustee named in will	Not resident Commonwealth Regardless of who are beneficiaries	Bond
Sole estate trustee where there is will but not named in will	Resident Ontario No minor/incapable beneficiaries	No bond *(this is a recommended change)*
	Resident Ontario Minor/incapable beneficiaries	Bond
	Not resident Ontario Regardless of who are beneficiaries	Bond
One of multiple estate trustees named in will	All resident Commonwealth Regardless of who are beneficiaries	No bond
	Where at least one resident in Ontario, for ones not resident Commonwealth No minor/incapable beneficiaries	No bond *(this is a recommended change)*
	One of multiple estate trustees named in will not resident in Commonwealth Minor/incapable beneficiaries	Bond
	All not resident Commonwealth Regardless of who are beneficiaries	Bond
One of multiple estate trustees where there is will but not named in will	All resident Ontario No minor/incapable beneficiaries	No bond (*this is a recommended change)*
	Where at least one resident in Ontario, for ones not resident in Ontario No minor/incapable beneficiaries	No bond (*this is a recommended change)*
	Regardless of residence of any estate trustee Minor/incapable beneficiaries	Bond
Sole estate trustee No will	Resident Ontario No minor/incapable beneficiaries	No bond (*this is a recommended change)*
	Resident Ontario Minor/incapable beneficiaries	Bond
One of multiple estate trustees No will	All resident Ontario No minor/incapable beneficiaries	No bond (*this is a recommended change)*
	All Resident in Ontario Minor/incapable beneficiaries	Bond

MAG Questions

Below are the answers to specific questions posed by MAG in response to the OBA's original Submission.

MAG Question 1 - Was it the OBA's intention to propose the repeal of s. 5 of the *Estates Act* to effectively allow non-residents of Ontario to apply to administer an intestate estate? This would be a significant change in the law as such applications are currently not accepted.

Response

No. The focus of the Submission is on dispensing with a bond in some limited circumstances where it is currently required. It is not concerned with extending the granting of a Certificate of Appointment of Estate Trustee Without A Will (letters of administration) to a non-resident of Ontario in the case of an intestacy. Appendix A to the Submission lists a variety of scenarios where it is recommended that a bond not be required. For example, the Submission proposes that a bond not be required from a non-resident of Ontario on a testacy where at least one other applicant is resident in Ontario and all beneficiaries are ascertained and *sui juris*. The above Chart clarifies the OBA's position.

The Chart does contemplate a non-resident administering an estate with a will where he or she is not named in the will (letters of administration with the will annexed - now Certificate of Succeeding Estate With A Will under the *Rules of Civil Procedure*); subject to a bond being delivered to the Court in certain circumstances. Accordingly, section 5 may need to be amended to provide that letters of administration (as opposed to letters of administration with a will annexed) shall not be granted to a non-resident **on an intestacy only.**

As noted in the Law Reform Commission report, the residency of an applicant in Ontario will ensure accountability (and availability of assets) of at least one of the applicants. In response to the concerns of the Office of the Public Guardian and Trustee ("PGT") and the Office of the Children's Lawyer ("CL"), the requirement for a bond in these circumstances will exist for estates with beneficiaries who are either unborn, unascertained, under the age of majority or mentally incapable.

MAG Question 2: Was it the OBA's intention to add a requirement for the consent of a majority of creditors to any application to dispense with or reduce the amount of a bond of administration? It is not clear if this would be required in all cases – which would be a significant administrative burden – or only where the application was being filed by a person in his or her capacity as a creditor of the estate.

Response

The "New Provision" contemplated at the bottom of p. 6 of is not a requirement for *any* application to dispense with or reduce the amount of a bond of administration. Reference should be made to Appendix "A" for when the requirement of a bond should be dispensed with regardless of whether or not a creditor is the applicant. Of course, the ability of the court to dispense with the requirement of posting a bond should remain.

MAG Question 3 - Can the Section comment on any practical impact from the Order of Brown J. in *Re: Henderson Estate* and *Re: Zagaglia Estate*?

Response The Order of Justice Brown in *Re: Henderson Estate* and *Re: Zagaglia Estate* deals with the situation where the court is asked to dispense with the posting of a bond where it is otherwise required. The purpose of the Submission is to reduce the circumstances where a bond is required, thus avoiding the need to apply to a judge to waive the posting of a bond and thus the number of cases where *Re: Henderson/Zagaglia* type applications would be necessary.

The Submission recognizes and protects the interests of the creditors and beneficiaries in much the same way Justice Brown sought to do in setting out the requirements on an application to waive the posting of a bond (see para. 10 in *Re: Henderson*). The Submission codifies much of Justice Brown's requirements and should reduce the number of applications to the court for the waiver of a bond. Where the applicant does not otherwise meet the conditions required under the proposed exemptions, the case is helpful in that it codifies what the court requires for an order dispensing with a bond under its power to do so.

MAG Question 4 - With respect to a direct right of action on a bond, could the OBA indicate how a direct right of action on a bond would work in practice, and who would have safekeeping of the bond?

Response

Upon further consideration, we are withdrawing the proposal in the Submission to amend s. 35(1) and delete s. 38 of the Estates Act (requirement to assign bond).