



April 14, 2010

Hon. Chris Bentley  
Attorney General of Ontario  
McMurtry-Scott Building  
720 Bay Street, 11th Floor  
Toronto, ON  
M5G 2K1

Dear Minister:

**Re: Proposed Amendments to *Estates Act* in relation to the Bonding of Estate Trustees**

This correspondence is forwarded to you on behalf of the Ontario Bar Association and our Trusts and Estates Section.

Almost twenty years have passed since the Ontario Law Reform Commission (OLRC) issued recommendations on the bonding of estate trustees in its *Report on Administration of Estates of Deceased Persons* on March 12, 1991 (the "Report").<sup>1</sup> We believe that reform of the law requiring bonding of estate trustees is required at this time, in order that Ontario legislation may be in keeping with the times and modern practices.

Section 35 of the *Estates Act*<sup>2</sup> requires that every person to whom is granted letters of administration, including with will annexed, must give a bond to the judge of the court from whom the grant was made as security for the collection, administration and accounting of the property of the deceased, unless otherwise provided by law. Using current terminology under the Rules of Civil Procedure<sup>3</sup> this would apply to all Certificates of Appointment of Estate Trustee without a Will as well as to Certificates of Appointment of Estate Trustee With A Will where the applicant is not named in the Will.

The purpose of the bond is to provide protection to the beneficiaries and creditors or the estate for negligence and/or misappropriation on the part of the estate trustee applying for the grant. While the posting of a bond is generally not required of a person to whom a

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<sup>1</sup> Please note that references in the Report to the *Estates Act* are to previous legislation: *Estates Act*, R.S.O. 1980, c. 491. The references in this correspondence are to the current legislation unless otherwise noted. In addition, reference in the Report to the "rules" are to the Rules Governing Proceedings Under the *Estates Act*, R.R.O. 1980, Reg. 925, which rules have been repealed.

<sup>2</sup> R.S.O. 1990, c.21 (hereinafter "*Estates Act*"), s. 35.

<sup>3</sup> R.R.O. 1990, Reg. 194, r. 74.01

Certificate of Appointment of Estate Trustee with a Will is granted (letters probate), the *Estates Act* imposes a bonding obligation on such persons who are not resident in Ontario or elsewhere in the Commonwealth.<sup>4</sup>

There is no question that the interests of beneficiaries and creditors of an estate must be protected. However, the current requirements for bonding of estate trustees are problematic for a number of reasons. For example,

- Few insurance companies issue estate trustee bonds. We are aware of the following companies: St. Paul Guarantee Insurance Company, The Guarantee Company of North America, The Dominion of Canada General Insurance Company, and Economical Mutual.
- There are frequently circumstances in which an estate trustee bond cannot be obtained, for example, where the estate trustee applying is not a US or Canadian resident; each of the insurance companies referenced above has confirmed that it will generally issue a bond only for US and Canadian residents.
- 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,<sup>5</sup> but we understand that office does not view the unavailability of a bond as sufficient 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.
- Pursuant to section 6 of the *Estates Act*, an applicant named in a will who is resident in a Commonwealth jurisdiction<sup>6</sup> is not required to post a bond, but an applicant resident in a non-Commonwealth jurisdiction will be required to post a bond. This means that an applicant resident in Australia need not post a bond but an applicant resident in the United States must, which is a puzzling result. The determination of whether or not a bond is required on the basis of the applicant's residence in a Commonwealth or non-Commonwealth jurisdiction is anachronistic.

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<sup>4</sup> Estates Act, s. 6.

<sup>5</sup> *Crown Administration of Estates Act*, R.S.O. 1990, c. C.47, ss.1 and 2.

<sup>6</sup> A full listing of Commonwealth countries may be obtained at [www.thecommonwealth.org](http://www.thecommonwealth.org).

- The requirement of an estate trustee bond increases the cost of administering an estate, and routinely applications are made to the Court to dispense with estate trustee bonds.

For all these reasons, we recommend a more modern approach.

The Executive requests that the Ministry of the Attorney General consider implementing in full the recommendations of the OLRC in relation to the bonding of estate trustees, subject to the modifications arrived at following consultation with representatives of the Office of the Public Guardian and Trustee and the Office of the Children’s Lawyer. as outlined below.

#### OLRC Recommendations

As noted at page 222 of the Report, traditionally administration bonds were required to provide protection for claimants and beneficiaries against a defalcating personal representative. Section 35 of the *Estates Act* provides:

s. 35 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 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.

While the posting of a bond is generally not required of applicants named as executor or estate trustee in the Will, , section 6 of the *Estates Act* imposes such an obligation in limited circumstances:

s. 6 Letters probate [Certificate of Appointment of Estate Trustee With A will where the applicant is named in the Will] shall not be granted to a person not resident in Ontario or elsewhere in the Commonwealth unless the person has given the like security as is required from an administrator in the case of intestacy or in the opinion of the judge such security should under special circumstances be dispensed with or be reduced in amount.

In its Report, the OLRC recommended that the offices of executor and administrator should be assimilated<sup>7</sup> and approved of the modern trend away from a general bonding

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<sup>7</sup> Report on page 225 and in chapter 2, sec. 1(d)

requirement in the United States and the United Kingdom, and concluded that there should be no general bonding requirement for estate trustees in Ontario as the present requirement already adds unnecessarily to the costs of administration and it would be unjustifiable to extend the present requirement to all estate trustees.<sup>8</sup> Recently, the Trusts and Estates Section has surveyed various jurisdictions (including the United Kingdom, New Zealand, New York, Pennsylvania and Colorado) to ascertain each said jurisdiction's current bonding requirement. All these jurisdictions have moved away from a general bonding requirement, albeit in various different ways. The United Kingdom has no general bonding requirement, leaving the relationship between executors and beneficiaries to be governed by the fiduciary principles of trust law. The courts of Pennsylvania will not require a bond where the will or trust waives same, and if an individual non-resident executor is acting with a resident executor, the court will also waive the requirement to post a bond. In New Zealand the statutory provisions which formerly required an executor or administrator to post a bond were repealed in 1979 and now a court may in limited circumstances exercise its discretion to require the posting of a bond which discretion we understand is exercised sparingly.

The OLRC concluded that bonding should be required only in limited circumstances:

“For example, in view of the difficulties associated with obtaining and enforcing a judgment outside the jurisdiction, estate trustees who are not resident in Ontario should be bonded. On the other hand, bonding should not be required if any one of the estate trustees is resident in Ontario. The Commission recommends therefore, that no bond should be required of a recipient of an estate trustee certificate unless,

- (a) the recipient of, or all of the recipients of, an estate trustee certificate are nonresidents of the Province of Ontario;
- (b) the recipient applied for an estate trustee certificate solely in [his or] her capacity as a creditor of the estate;
- (c) the court has ordered the posting of a bond; or
- (d) the will requires the posting of a bond.

The Commission further recommends that, notwithstanding the above, the court should also be able to dispense with the necessity of posting a bond in any

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<sup>8</sup> Report at 227.

situation where it determines that the posting of a bond is not necessary or where the beneficiaries and a majority of the creditors (by value) concur.<sup>9</sup>

The OLRC recommended retaining section 36 of the *Estates Act*, the section that provides that security is not required of (1) the Government of Ontario, or any of its ministries or agencies or commissions; and (2) a surviving spouse who is granted administration on an intestacy where the net value of the estate does not exceed the preferential share under the *Succession Law Reform Act*<sup>10</sup>.

With respect to the bonding of trust corporations, the OLRC recommended that s. 175(4) of the *Loan and Trusts Corporations Act*<sup>11</sup> also be retained. That section provides:

175(4) Despite any rule, practice or statutory provision, it is not necessary for a trust corporation approved under subsection (2) to give any security for the due performance of its duty as executor, administrator, trustee, receiver, liquidator, assignee, guardian or committee unless so ordered by a court.

#### Recommended Amendments to the *Estates Act*

Where possible, we have provided suggested drafting for amendments to reflect our submission, recognizing that there may need to be modifications to reflect changes in terminology and legislative drafting protocols.

#### Section 5 *Estates Act*

Current: Letters of administration shall not be granted to a person not residing in Ontario, but this does not apply to resealing letters under section 52.

#### Section 6 *Estates Act*

Current: Letters probate shall not be granted to a person not resident in Ontario or elsewhere in the Commonwealth unless the person has given the like security as is required from an administrator in the case of intestacy or in the opinion of the judge such security should under special circumstances be dispensed with or be reduced in amount.

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<sup>9</sup> Report at 227.

<sup>10</sup> O. Reg. 54/95, s.1 provides that the current preferential share is \$200,000; at the time of the Report the preferential share was \$75,000.

<sup>11</sup> R.S.O. 1990, c. L.25.

Comments: These provisions should be amended/deleted and whatever provisions added to make it clear when a bond is not required and when it is not. We have not provided actual draft wording.

The changes should align with the recommendation of the OLRC to reduce the requirement for bonding to circumstances where there is a rational need for security, while maintaining the current exemption where the recipient is named in the will i.e., where the estate trustee named in the will is a resident of Ontario or elsewhere in the Commonwealth. Generally, in any other case where today a bond is required, we recommend that if at least one recipient of an estate trustee certificate is resident in Ontario, there should be no bond requirement for that estate trustee, and for any others if there are multiple estate trustees, subject to who are the beneficiaries of the estate. Following on discussions with representatives of the Office of the Public Guardian and Trustee and the Office of the Children's Lawyer, we are amenable to maintaining the initial requirement for a bond that exists today for estates with beneficiaries who are unborn, unascertained, under the age of majority or mentally incapable within the meaning of section 6 of the *Substitute Decisions Act, 1992* ("Minor/Incapable Beneficiaries"). We agree that it should be left to the court, on request, to decide to dispense with the bond requirement in those cases. Please see attached Appendix A setting out where a bond would be required or not, based on estate trustee status, residence and who the beneficiaries of the estate are.

As well, a bond would initially be required where:

- (a) the recipient applied for an estate trustee certificate solely in his or her capacity as creditor of the estate;
- (b) the court has ordered the posting of a bond; or
- (c) the Will of the deceased requires the posting of a bond.

New provision            A new provision should be added:

Notwithstanding [the foregoing], the court shall dispense with the posting of a bond where the beneficiaries and a majority of the creditors (by value) concur, other than where the court has ordered the posting of a bond, and may dispense with the posting of a bond in any situation where it determines that the posting of a bond is not necessary.

Section 35(1) *Estates Act*

**Current:** 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 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.

**Amendment:** Where security or a bond is required, such person shall give a bond to the judge of the court by which the grant is made, to enure for the benefit of the persons interested in the administration of the estate. In the event that any such person sues on the bond, such person shall recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the bond.

**Comment:** OLRC comments that on default, a claimant must obtain an assignment of the bond from the court before he or she can sue on the bond in his or her own name, and suggests that this procedure is unnecessary. This change would also require deletion of s. 38 [see Report p 228] Reduces red tape and simplifies the procedure for persons whose benefit the bond is intended.

Section 37(1) *Estates Act*

**Current:** The bond shall be in a penalty of double the amount under which the property of the deceased has been sworn, and the judge may direct that more than one bond be given so as to limit the liability of any surety to such amount as the judge considers proper.

**Amendment:** The bond shall be in a penalty [equal to] the amount under which the property of the deceased has been sworn, and the judge may direct that more than one bond be given so as to limit the liability of any surety to such amount as the judge considers proper.

**OR**

The bond shall be in a penalty equal to the amount the judge considers proper, and the judge may direct that more than one bond be given so as

to limit the liability of any surety to such amount as the judge considers proper.

Comment: The current general practice is that the bond amount is equal to the amount of the property as sworn, and not twice the amount.<sup>12</sup> The amendment would bring the legislation in keeping with current practice.

**OR**

The current general practice is that the bond amount is equal to the amount of the property as sworn, and not twice the amount.<sup>13</sup> The amendment would provide flexibility in relation to what amount would be appropriate in the circumstances.

Section 37(2) *Estates Act*

Current: The judge may at any time under special circumstances reduce the amount of or dispense with the bond.

Amendment: The judge may at any time under special circumstances reduce the amount of or dispense with the bond. "Special circumstances" would include where a judge determines that the posting of a bond is not necessary or where the beneficiaries and a majority of creditors (by value) concur [see Report p 227]

**OR**

The judge may at any time under appropriate circumstances reduce the amount of or dispense with the bond having regard to circumstances including:

- (a) the value of the estate;
- (b) the financial position of the proposed estate trustee;
- (c) the extent of the proposed estate trustee's interest (if any) in the estate;
- (d) whether or not the proposed estate trustee is a creditor of the estate;

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<sup>12</sup> W. Yenson and S. Roth, "The Nuts and Bolts of Applying to be Appointed an Estate Trustee without a Will: Applications, Beneficiaries and Bonds" No Will Know How (OBA CLE – April 29, 2002) at 17.

<sup>13</sup> W. Yenson and S. Roth, "The Nuts and Bolts of Applying to be Appointed an Estate Trustee without a Will: Applications, Beneficiaries and Bonds" No Will Know How (OBA CLE – April 29, 2002) at 17.

- (e) whether or not there are minor beneficiaries or beneficiaries under any other disability;
- (f) whether or not the beneficiaries and a majority of creditors (by value) concur;
- (g) such other matters as the judge considers relevant.

Comment: The amendment would bring the legislation in keeping with current practice.

**OR**

The amendment would provide the judge with guidance as to relevant factors to consider.

*Section 38 Estates Act*

Current: The judge on application made in a summary way and on being satisfied that the condition of the bond has been broken may order the registrar to assign the bond to some person to be named in the order, and such person is thereupon entitled to sue on the bond in the person's own name as if it had been originally given to the person, and shall recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the bond.

Amendment: Delete the section. See comments regarding section 35(1) above.

*Additional Provisions to be Added to the Estates Act*

1. A section should be added to the statute that provides that either before or after the grant of a Certificate, any person having an interest in the administration of an estate may apply to the court for an order requiring the posting of a bond or an additional bond by the estate trustee [see Report p 228].
2. A section should be added to the statute that provides the court with the power to revoke the Certificate and to make such further order as may be just in the circumstance [see Report p 228]
3. A section should be added to the statute that provides an estate trustee, surety or any person having an interest in the administration of the estate

may apply to the court at any time to have the amount of the bond reduced or the terms of the bond varied, or a substitution of the security granted [see Report p 228]

NB – Forms 74.32 and 74.33 have been revised and by its terms the surety is responsible for negligence of the estate trustee as well as dishonesty so the recommendation in relation to the amendment of the forms [see Report p 228] are not required.

#### Estates Act sections that do not Require Amendment

The following sections of the *Estates Act* which reference “security” do not require amendment:

14(2)  
36  
39  
40  
41  
42  
43  
50  
52

#### Related Legislation that does not require Amendment

S.. 37(2) of the *Trustee Act*<sup>14</sup>, appointment of personal representative by court, refers to giving security.

Current: Every person so appointed [by a court to act in the place of an executor or administrator removed] shall, unless the court otherwise orders, give such security as would be required to be given if letters of administration were granted to the person under the *Estates Act*

Comments: It may or may not require amendment depending on the particular wording of the *Estates Act* amendments.

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<sup>14</sup> R.S.O. 1990, c. T.23.

We note that the following *Rules of Civil Procedure*<sup>15</sup> make reference to “the security required by the *Estates Act*,” but none of the sections require further amendment:

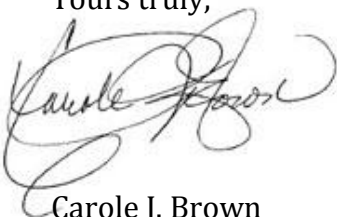
74.04 (1)(h)  
74.05 (1)(d)  
74.05.1 (1)(d)  
74.06 (1)(d)  
74.07 (1)(c)  
74.08 (1)(b)  
74.09 (1)(b)  
74.10 (1)(b)

Rule 74.11 of the *Rules of Civil Procedure* is entitled “Bonds” and does not require amendment. This rule provides that a bond may be the bond of any insurance or guarantee company, or the bond of one or more personal sureties, and Forms 74.32 and 74.33 are provided for these bonds.

Finally, we note that the *Substitute Decisions Act, 1992*<sup>16</sup> has several sections which provide for “security” to be posted by a person applying to be an incapable person’s guardian of property: s. 17(6), 17(7), 24(3), 24(4) and 25(2). These sections are broadly worded and as such do not require amendment.

Thank you for your consideration of this matter. We look forward to receiving your comments in due course. If we can provide you with any further information in relation to this matter, please advise.

Yours truly,



Carole J. Brown  
President  
Ontario Bar Association

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<sup>15</sup> R.R.O. 1990, Reg. 194, as am.

<sup>16</sup> S.O. 1992, c. 30, as am.

**Appendix A**

<b>Derivation of status</b>	<b>Residency and Beneficiary Circumstances</b>	<b>Bond/No Bond Per Estate Trustee</b>
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 <i>(change)</i>
	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 <i>(change)</i>
	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 <i>(change)</i>
	Where at least one resident in Ontario, for ones not resident in Ontario No minor/incapable beneficiaries	No bond <i>(change)</i>
	Regardless of residence of any estate trustee Minor/incapable beneficiaries	Bond
Sole estate trustee No will	Resident Ontario No minor/incapable beneficiaries	No bond <i>(change)</i>
	Resident Ontario Minor/incapable beneficiaries	Bond
	Not resident Ontario Regardless of who are beneficiaries	Bond
One of multiple estate trustees No will	All resident Ontario No minor/incapable beneficiaries	No bond <i>(change)</i>
	Where at least one resident in Ontario, for ones not resident in Ontario No minor/incapable beneficiaries	No bond <i>(change)</i>
	Regardless of residence of any estate trustee Minor/incapable beneficiaries	Bond