ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

DEADBEAT

Volume 31, No. 1 – March 2012 Trusts & Estates Law Section

Breaking the Bonds that Bind: The Need to Reform the Bonding Requirements in Ontario's *Estates Act*

By Amy Cull*

In April 2010, the Ontario Bar Association ("OBA") substantially endorsed the adoption of the recommendations[1] made some 20 years prior by the Ontario Law Reform Commission ("OLRC") to modernize the bonding requirements set out in Ontario's *Estates Act*[2] (the "*Estates Act*"). The following is a brief summary of the current state of the law, the problems associated therewith, and the recommendations made.

What is the purpose of the bond?

The primary purpose of the bond requirement is to provide protection to the beneficiaries and creditors of an estate from negligence or misappropriation on the part of the estate trustee who is applying for the grant.

When is the posting of a bond required?

Applications for bonds are most frequently seen in the following situations:

- When an estate trustee is seeking appointment, but there is no will;[3]
- When an estate trustee is seeking appointment, and there is a will, but the applicant was not appointed an estate trustee pursuant to it;[4] and
- When there is a will and the estate trustee making the application was appointed pursuant to it, but the estate trustee is a non-resident of Ontario and the Commonwealth.[5]

What is the value of the bond?

Subsection 37(1) of the *Estates Act* is clear that a bond must be twice the value of the estate. However, subsection 37(2) gives the court discretion to stray from the general requirement and either reduce the

[1] The OLRC's recommendations are set out in its *Report on Administration of Estates of Deceased Persons* on March 12, 1991. See: http://www.oba.org/En/publicaffairs_en/PDF/EstatesBonding.pdf.
[2] R.S.O. 1990, c. E.21.
[3] *Estates Act*, R.S.O. 1990, c. E.21, s. 35.
[4] *Ibid.*
[5] *Ibid.*, s. 6.

amount of the bond or dispense with it altogether, provided "special circumstances" can be shown to exist that merit the adjustment.[6]

What is required to dispense with a bond – filing requirements

The *Estates Act* does not enumerate the factors that a court is to consider when a request is made to reduce or dispense with a bond. As such, reference should be had to the case law and, in particular, *Re Henderson Estate*,[7] wherein the Honourable Mr. Justice D.M. Brown set out eight (8) criteria that an applicant must address by way of affidavit evidence in support of any application made to dispense with a bond.

What are the problems with the existing bond requirements?

The current bonding requirements are problematic for a number of reasons, including:

- Few insurance companies issue estate trustee bonds;
- There are frequently situations where an estate trustee bond cannot be obtained, such as where the applicant estate trustee is not a U.S. or Canadian resident;
- If an estate trustee bond cannot be obtained this could result in a situation where no one will apply for a Certificate of Appointment;[8]
- There is an anachronistic bias inherent in the legislation which permits a non-resident from another commonwealth jurisdiction (such as Australia or St. Lucia) to apply without the necessity of obtaining a bond, but requires a non-resident from a non-commonwealth jurisdiction (such as the U.S.) to post a bond;
- As a result of the foregoing, applications or motions are routinely made to the court to dispense with a bond, which, in turn, delays the administration of an estate and significantly increases the administration costs as well.

Recommended Changes to the Estates Act:

The two primary changes that have been recommended by the OLRC/OBA are:

- Amend sections 5 and 6 of the *Estates Act* which require that *all* foreign executors named in a will obtain a bond, and make practical exceptions to the requirement. One such exception would be that, where there are multiple estate trustees and at least one is a resident of Ontario, no bond should be

[6] In practice, the requirement to post a bond is usually dispensed with or the value reduced to the value of the estate itself, provided the applicant is not a beneficiary. If the applicant is a beneficiary, the beneficiary's share of the estate is generally deducted from the amount of the bond.
[7] *Henderson Estate, Re*, 2008 CarswellOnt 8065 (Ont. S.C.J.).
[8] After all, the Office of the Children's Lawyer has no statutory jurisdiction to administer estates. And, while the Office of the Public Guardian and Trustee has the statutory jurisdiction to administer estates pursuant to sections 1 and 2 of the *Crown Administration of Estates Act*[8] generally the Public Guardian and Trustee 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 Ontario.

required unless there are beneficiaries who are unborn, unascertained, under the age of majority or mentally incapable within the meaning of section 6 of the *Substitute Decisions Act*.[9]

- Amend the general bonding requirement in section 35 of the *Estates Act* that currently applies to *all* estate trustees not named in a will, such that Ontario residents do not require a bond, unless there are beneficiaries who are unborn, unascertained, under the age of majority or mentally incapable within the meaning of section 6 of the *Substitute Decisions Act*.[10]

Such proposals are reasonable given that there are clear remedies for breach of fiduciary duty, joint and several liability also governs the actions of estate trustees, and enforcement is not necessarily an issue if at least one of the applicants is a resident of Ontario (and, thus, there are assets available if a breach occurs).

Conclusion

In small estates, a bond may not be worth the burden of trying to get one, or the expense associated with a motion to dispense with one. The recent decision of the Honourable Mr. Justice J.W. Quinn in *Re D'Angelo Estate*[11] is demonstrative of the judicial gymnastics sometimes employed by our courts to get over the hurdles facing non-resident estate trustees who try to obtain a bond.[12] Given the challenges resulting from our current legislative regime, it may be that, some twenty or so years later, the time has come for our legislature to heed to the recommendations made by the OLRC, and endorsed by our OBA, to modernize our existing legislation governing estate trustee bonds.

**Amy Cull, Whaley Estate Litigation*

[9] 1992, S.O. 1992, c. 30.
[10] *Ibid*.
[11] 2010 CarswellOnt 9868.
[12] In that case, the court appointed a "monitor," to work alongside the foreign estate trustees.