Expanding the Availability of Electronic Beneficiary Designations

Submitted to: The Honourable Caroline Mulroney, Attorney General of Ontario

The Honourable Victor Fedeli, Minister of Finance

Submitted by: Ontario Bar Association

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
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Contents

Introduction

The Ontario Bar Association (the "**OBA**") welcomes the government's recent move to expressly permit the use of electronic beneficiary designations for plans governed by the *Pension Benefits Act* (the "**PBA**").[1]

In light of this move, we provide this submission to identify amendments that can be made to eliminate the differential treatment of pensions that are converted into their "locked-in" equivalents, and to benefit other plans like RRSPs and TFSAs held by individuals in Ontario. As we outline below, the changes that we propose will also address a potential inconsistency between the changes and the application of the *Electronic Commerce Act, 2000* (the "**ECA**").[2] In our view a straightforward but comprehensive legislative amendment could be made to the *Succession Law Reform Act* (the "**SLRA**")[3] to expressly expand the availability of electronic beneficiary designations, and address these related concerns. We propose to outline each of these items in our submission below.

The Ontario Bar Association

Established in 1907, the OBA is Ontario's largest voluntary legal advocacy organization, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA provides input and expert advice on a broad range of topics in the interest of the profession and in the interest of the public.

This response has been developed primarily by the OBA's Trusts and Estates Law section, with input from the Pensions and Benefits Law section and Elder Law Section. Collectively, our members regularly represent the broadest possible range of clients in relation to estate planning and administration and pensions and benefits across the province, including individuals, their families, plans and financial institutions.

[1] R.S.O. 1990, c. P.8.
[2] S.O. 2000, c. 17.
[3] R.S.O. 1990, c. S.26.

Availability of Electronic Beneficiary Designations

We are encouraged by the government's steps to expressly permit electronic beneficiary designations for plans under the PBA by adding the following section:

> **Electronic designation of beneficiaries**
>
> 30.1.1 (1) Despite anything to the contrary in the Succession Law Reform Act, an administrator may permit members, former members and retired members to designate beneficiaries electronically for the purposes of any provision in this Act permitting the designation of a beneficiary.
>
> **Same**
>
> (2) The administrator shall comply with any prescribed requirements respecting the electronic designation of beneficiaries.

However we wish to address related concerns with respect to locked-in pension vehicles, other non-pension plans used in Ontario as retirement and savings vehicles, and a concern with respect to the applicability of the ECA.

Inconsistent with Locked-In Pension Vehicles

We note that under the PBA, when an individual leaves employment with a vested pension plan, he or she may be able to transfer the commuted value of the pension to a locked-in plan: a locked-in retirement account (a "**LIRA**") or life income fund (a "**LIF**"). While these are locked-in under the PBA, they are at first instance registered retirement savings plans ("**RRSPs**") and registered retirement income funds ("**RRIFs**"). Under the PBA, they must be RRSPs and RRIFs in order to be LIRAs and LIFs.[4]

The former member or person entitled to or required to establish this type of plan is called the annuitant of the locked-in RRSP or RRIF. To the extent the annuitant dies with funds in these locked-in plans, and there is no statutorily entitled spouse or common-law partner at the death of the annuitant, the annuitant may have designated a beneficiary to receive the plan proceeds. However, the designation of beneficiaries for these locked-in plans is governed by the SLRA. In our view, it would be inconsistent to expressly allow the pension plan member to be able to make an electronic designation of the funds while they are in the

[4] See regulations under the PBA that define LIRA's and LIF's: O.Reg. 909, 1(1).

pension plan, but not when they are moved to a locked-in plan, especially when the funds are both covered by the PBA.

Excludes RRSPs, TFSAs and other Plans

The OBA supports clear and consistent rules regarding how people may deal with their assets on death. In addition to pension plans, Ontarians hold much of their savings in RRSPs, RRIFs, Tax Free Savings Accounts ("**TFSAs**") and other employee plans. Having consistent, modern laws that allow them to be able to deal with them on death is essential. While we support revisions to the PBA to expressly allow for electronic beneficiary designations, we believe that the ability to make electronic beneficiary designations should be available to all plans covered by Part III of the SLRA, which applies to pension plans in addition RRSPs, RRIFs, TFSAs and other employee plans.[5]

Beneficiary designation provisions were added to the SLRA's predecessor legislation in Ontario following a Supreme Court of Canada decision which held that a beneficiary designation on a pension plan is considered to be a testamentary disposition.[6] The current SLRA provisions (and similar legislation in other provinces) allow for beneficiary designations on plan forms and otherwise, rather than continuing the law that required proceeds of these plans to pass on death only through a valid will or on intestacy.

While a legislative change to expressly permit electronic beneficiary designations on pension plans is welcome, for clarity and consistency, and in keeping with advances in technology and how people plan and operate their finances, we submit that the other types of plans covered by Part III of the SLRA should also be expressly permitted to offer electronic beneficiary designations.

Potentially Inconsistent with the Electronic Commerce Act, 2000

Finally, we wish to draw to your attention a further possible inconsistency regarding the proposed change to the PBA and the ECA. The ECA currently provides that it does not apply to "Wills and codicils".[7] "Wills" is not defined in the ECA. "Will" is, however, defined in the SLRA and includes a codicil and "any other testamentary disposition."[8] As decided in the *MacInnes* case, mentioned above, pension plan beneficiary designations are testamentary dispositions. Given that 'will' is not defined in the ECA, there is currently a

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[5] See "plan" as defined in s. 50 of the SLRA.
[6] *MacInnes v. MacInnes*, [1935] SCR 200, 1934 CanLII 16 (SCC).
[7] See ECA s. 31(1).
[8] SLRA s. 1(1).

lack of clarity as to whether the ECA, which sets out rules regarding the legal recognition of electronic documents as substitutes for paper documents, applies to electronic beneficiary designations in respect of plans listed in Part III of the SLRA.

A preferable approach to this state of affairs would be to make changes to the SLRA to expressly state that electronic beneficiary designations can be made on all Part III plans, and to clarify how the ECA applies to electronic beneficiary designations in light of the state of the common law and definitions under the SLRA. This would avoid an inconsistent application of the law to these plans.

Finally, we note that s. 30.1.1(2) of the amended PBA set out above, contemplates "prescribed requirements respecting the electronic designation of beneficiaries." In our view, any such requirements could be applied to all SLRA plan designations to provide consistency across plan types.

Conclusion

Once again, we thank you for considering these comments and would be pleased to answer any questions that may arise.