



## Entitlement to Notice of a Passing of Accounts

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As noted in February's Solicitor's Tip, there are new rules in place governing service of an application to pass accounts. This month's Solicitor's Tip explores who is entitled to notice of the application. While entitlement to notice may seem relatively simple at first glance, looks can be deceiving.

The *Rules of Civil Procedure* require notice of an application to be served on "each person who has a contingent or vested interest in the estate".<sup>1</sup> However, the form of notice of application that must be filed with the court when applying to pass accounts is worded differently, requiring applicants to serve "each person with a financial interest in the estate".<sup>2</sup> The language used in the form can also be found in the *Estates Procedures Manual*.<sup>3</sup>

This discrepancy in wording is noteworthy because the pool of persons with a financial interest in an estate can be broader than persons who have a contingent or vested interest. Under Rule 74.15, anyone with a financial interest in an estate may apply for assistance from the court, including seeking an order to compel a passing of accounts.<sup>4</sup> This provision has been interpreted as permitting anyone to seek assistance who has a direct, indirect, or contingent interest in the estate, including parties entitled to claim executor's compensation.<sup>5</sup>

One perhaps surprising party who is not entitled to notice of an application to pass accounts is an estate creditor. Despite being impacted by the manner of the administration of the deceased's estate, the Superior Court of Justice recently held that there is no requirement to serve notice on estate creditors or alleged creditors, as creditors have neither a vested nor contingent interest in the estate.<sup>6</sup> This decision is in keeping with a growing body of case law recognizing that estate creditors may not always have standing to seek the court's assistance during an estate administration.<sup>7</sup>

It may also be surprising to learn that a person may be entitled to notice of an application to pass accounts on the basis of their conduct. In *Bittante v Dubajic*,<sup>8</sup> the estate trustee brought an application to pass accounts after the deceased's daughter had commenced litigation regarding the estate in Italy and had demanded an accounting. The court held that the daughter, who was not named as a beneficiary under the deceased's will, ought to have been served with notice of

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<sup>1</sup> *Rules of Civil Procedure*, RRO 1990, Reg 194, r. 74.18(3).

<sup>2</sup> *Ibid.*, r. 74.18(2), Form 74.44.

<sup>3</sup> Ontario Ministry of the Attorney General, *Estates Procedures Manual* (Court Services Division, October 2022) at s. 17.5.

<sup>4</sup> *Rules*, *supra* note 1, r. 74.15(1)(h).

<sup>5</sup> See Ian M. Hull & Suzana Popvic-Montag, *Macdonell, Sheard and Hull on Probate Practice*, 5th ed. (Toronto: Thomson Reuters, 2016) at Chapter 17.

<sup>6</sup> *Canada Trust v Ross*, 2019 ONSC 1165 at para. 30.

<sup>7</sup> See, for example, *Magnotta v. Magnotta*, 2020 ONSC 316 at para. 42; *Re Atkins (Estate)*, 2022 ABQB 428 at para. 145.

<sup>8</sup> *Bittante v Dubajic*, 2022 ONSC 6053.

the application to pass accounts, as “by her own conduct and admission,” specifically demanding a full and complete accounting through her counsel, the daughter was “a person with a financial interest in the Estate.”<sup>9</sup>

The court also confirmed that it is possible to apply to add a party to an application to pass accounts through either joinder,<sup>10</sup> or, if an application has been brought to compel an accounting, through Rule 9.01(4).<sup>11</sup> It is not appropriate, however, for an estate trustee to apply to the court to join a party to an application to pass accounts - instead, the estate trustee ought to simply serve notice on that party “as a matter of right”.<sup>12</sup>

Clearly, determining who is entitled to receive notice of an application to pass accounts will not always be a straight-forward task for estate trustees. While all persons with a vested or contingent interest in the estate ought to be served, service requirements do not extend to all parties who might have an indirect financial interest in the estate. Creating an extra layer of complication, it is now also advisable for estate trustees to consider whether a party who has demonstrated an interest in the estate through his or her conduct should also be served with notice of the application.

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<sup>9</sup> *Ibid.* at para. 12. At paragraph 13, Justice Sanfilippo expressly held: “Having demanded from [the estate trustee] the very accounting that [the estate trustee] now seeks to provide through the Application to Pass Accounts, [the deceased’s daughter] is an interested party in the estate”.

<sup>10</sup> *Rules*, *supra* note 1, r. 5.03. Also see *Bittante*, *ibid.* at para. 22.

<sup>11</sup> *Ibid.*, r. 9.01(4). Also see *Bittante*, *ibid.* at para. 21.

<sup>12</sup> *Ibid.* at para. 11.