HULL & HULL'S
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LAWPRO COVERAGE
OF LAWYERS AFTER RETIREMENT

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It would seem that scant consideration is given by lawyers who intend to retire from private practice to the problem of continuing errors and omissions liability coverage.

This problem is particularly important with respect to lawyers who practice as sole practitioners or in a small firm or in a smaller community in the usual or average private client, general practice, and especially important to those solicitors who have practiced without excess coverage for this liability.

I preface my comments by stating that they relate generally to the considerations that lawyers should give to this matter and for full particulars of the terms, conditions and subject matter of the policy I refer you to our primary insurers, Lawpro, customer service department, (416-598-5800 or www.lawpro.ca), and if applicable, to any excess carrier who has covered the lawyer or his firm.

First of all, while a lawyer has an errors and omissions policy, during his years of practice he is covered for acts of negligence in the practice of law by himself, his partners and those for whom he or they are responsible, and while the coverage is in force the insurer will respond to indemnify the lawyer, subject to the terms and conditions and amount of coverage of the policy.

At present, lawyers are required to be insured by Lawpro for primary coverage of one million dollars per claim as set out in the policy, for which they pay an annual premium, and if a claim succeeds in an amount in excess of the basic coverage, the claimant can look to the lawyer and his partners, if any, personally, for payment of that excess amount, unless of course excess coverage has been purchased from an excess insurer to increase the limits of coverage to the amount of the successful claim.

Policies are issued by Lawpro and most excess insurers on a "claims made" basis, that is, coverage relates to the date that the claim is made and not the date of the negligent act complained of. A copy of the policy can be viewed at http://lawpro.ca/insurance/LAWPRO_policy2003.asp.

Thus, while practicing, and subject to the terms and conditions and amount of coverage of the policy or policies, while so insured, lawyers are protected for claims made against them for their acts of negligence and the acts of negligence of their partners or those for whose acts they are responsible in the practice of law throughout their legal career to the date of their retirement.

The above comments are subject to the coverage afforded by the "innocent partner or party" coverage provided for in the policies. If further explanation is required I refer you to Lawpro or other excess insurers.

While worth mentioning in passing, claims over by a partner not involved in the negligent act against the employee or partner who committed the negligent act are rare, that right exists.

As well, the right of subrogation by the insurer is excluded by the terms of the policy except in cases of breach of a policy condition such as delay in reporting or failure to cooperate or fraud against the guilty party.

So, it seems that, provided adequate coverage is obtained to cover their liability, lawyers will be indemnified for claims for negligence during their practice years.

What amounts to adequate coverage, of course, depends on the individual circumstances of each practice, however, in the event of a shortfall in coverage, and the lawyer and his partner or partners face personal liability, it would seem that a lunge for the claimant's heart may be more effective in the event of a shortfall if they have provided more than less coverage.

I now turn to the different considerations which apply to the lawyer who is contemplating retirement.

Upon retirement Lawpro provides $250,000 of what is called "Runoff Coverage", which provides for a total of $250,000 errors and omissions insurance coverage after retirement..

Any claims which exceed that amount are for the personal account of the lawyer unless excess coverage has been obtained either by the lawyer or his firm.

Needless to say, excess coverage is available for purchase either through Lawpro or private carriers which is in addition to the runoff amount, and in each case application must be made to the insurance carrier on an individual basis.

The runoff problem is of little concern to retired lawyers who practiced with a large firm or other firm which continues to carry serious excess coverage after his retirement, as that lawyer's firm would continue to be covered for the lawyer's negligence for claims made against the lawyer for acts of negligence before the lawyer's retirement.

As I see it, if a retiring lawyer wishes to avoid having to look to personal assets to satisfy a claim for negligence, excess insurance must be purchased as the number and amount of claims has risen substantially over the years as consumerism marches on its merry way and the $250,000 limit is totally inadequate as reasonable errors and omissions coverage during retirement.

TRUSTEE, DIRECTOR, OFFICER, BENEFICIARY... ONE HAT TOO MANY?

A. Sean Graham, Hull & Hull

Trustees may be dismayed at the outset of their trust administration to find that they can be required to fulfill different roles, either by the trust, the law or simply practical necessity.[1] What often seems, to the layman, to be a ceremonial honour whose practical side-effects are limited to signing whatever documents an estate solicitor presents, can rapidly escalate into a full-time and thankless job requiring any number of complex tasks, decisions and roles. Such complexity is rarely to be avoided when the carrying out of a trust involves the continuation of an ongoing business in which the trust has a large or controlling interest. A trustee who thought she would simply be handing out assets to smiling, grateful beneficiaries may quickly be disabused of such utopian notions as she finds herself saddled with the very real tasks of not only a trustee, but also those of a director.

The dual role of trustee-director has a broad potential for conflict of interest. Both roles are fiduciary in nature and both have a raft of duties which flow from them. The most problematic duty for a person simultaneously fulfilling both capacities may be avoiding or managing conflicts of interest between the two. Very few testators will understand when creating their estate plan that a trust's best interests are not always identical to the best interests of a corporation in which it holds shares. A corporation prone to risky ventures is not a good fit with a conservative trust set up to preserve capital, and a conflict of interest between the director of such a corporation and the trustee of such a trust may be inevitable.

An overview of the most basic duties of trustees and directors is useful to place this discussion in broad perspective.

[1] While this article is directed primarily at estate trustees, the analysis is intended to be analogous to other trusts.

Duties of trustees

The fundamental duty of a trustee is to adhere to the terms of the trust, and to act in order to best fulfil those terms. Regardless of the individual trust, the common law imposes basic and general duties of good faith, and branching out of these are more specific duties. For the purpose of this article, generalization is necessary:

> The following might well be called the canons of trusteeship:
>
> (1) The trustee shall obey the directions of the settlement or trust instrument unless the Court authorizes changes or the beneficiaries consent to them pursuant to the rule in *Saunders v. Vautier*.
> (2) The trustee shall act impartially between beneficiaries.
> (3) The trustee must exercise ordinary care and prudence.
> (4) The trustee shall be loyal to her trust by not trafficking with her trust and shall not profit by her administration or permit her interests to conflict with that of the trust.
> (5) The trustee shall be ready with her accounts.
> [...]
> If the trustee fails to meet the standard of care referred to above, he or she will generally be held accountable and liable for any loss resulting from the breach, and must place the trust estate in the same position as it would have been in if no breach had been committed.[2]

A trustee must apply these principles to the administration of a trust's investment in a corporation just as to any other trustee function.

When the family company is essentially the result of a testator's life's work, it may be difficult to view a trust's shares in their basic form: as an investment. It will often be that shares held by a trust had some special, or even fundamental meaning to the testator, particularly if they are shares in a family corporation left as an inheritance to the beneficiaries.[3] Often what is first and foremost in the testator's mind is not ensuring a quick distribution of wealth in the short term, but

[2] Margaret O'Sullivan, "*Breach of Trust and its Consequences*", in: Widdifield on Executors and Trustees (6th *Edition*), (Carswell: Toronto, 2002) at 10-1.
[3] See *Baldissera v. Baldassi* (1997), 18 E.T.R. (2d) 128 (BCSC), where the testator made his priorities perfectly clear by directing that the residue remain invested in his businesses; and *Edell v. Sitzer*, [2001] Carswell Ont 5020 (Ont. S.C.J.).

rather a steady long-term income stream generated by the continuing viability of the business he created during his lifetime. Managing the business may be the trustee's most important task.

Freedom has to be given to trustees in the terms of the trust to maintain such investments, otherwise they must be sold, subject to the ability to carry it on for a reasonable length of time to enable its sale as a going concern.[4] In an ongoing trust, assuming the trustees are free to maintain the investment, if that investment is not prudent it should nevertheless be sold, and the proceeds invested in a more appropriate investment. If the corporation in question has by-laws or shareholder agreements which limit the ability to sell the shares, then the trustees will have to seek legal advice to determine whether the shares can be sold, and how to effect the sale.[5]

Assuming then that shares should be treated at the outset as though they are essentially just another estate investment, albeit often the most valuable and important one, then we move to the sections of the *Trustee Act* (Ontario) which govern investments by trusts.[6] Some of them are set out below:

> 27. (1) Standard of care — In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.
> [...]
> (5) Criteria — A trustee must consider the following criteria in planning the investment of trust property, in addition to any others that are relevant to the circumstances:
>
> 1. General economic conditions.
> 2. The possible effect of inflation or deflation.
> 3. The expected tax consequences of investment decisions or strategies.
> 4. The role that each investment or course of action plays within the overall trust portfolio.
> 5. The expected total return from income and the appreciation of capital.

[4] See Bernadette Dietrich, "*Assets*", in: Widdifield on Executors and Trustees, *supra* 1, at 2-30.
[5] For a detailed and readable summary of the active business issues facing trustees see: Rosanne Rocchi, "*The role of executor and trustee when administering active business assets*", in materials for: The Pitfalls of Being an Executor, December, 1999 Canadian Bar Association – Ontario.
[6] R.S.O. 1990, c.T.23 as amended 1998, c.18, Sched. B, s. 16(1); 2001, c.9, Sched. B, s.13(2)-(4).

6. Needs for liquidity, regularity of income and preservation or appreciation of capital.
7. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(6) Diversification — A trustee must diversify the investment of trust property to an extent that is appropriate to,

(a) the requirements of the trust; and
(b) general economic and investment market conditions.

Section 27(5)7 allows a trustee to hold onto shares in circumstances where they have a "special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries." Arguably, that section allows for flexibility in the overriding duty set out by section 27(1), such that even if an investment is not one that would normally be made by a prudent investor, if it has a special value to the purposes of the trust, it can be retained.

Trustees, it is submitted, are well-advised not to rely too strongly to the apparent protection offered by section 27(5)7. If a trustee holds on to shares in a corporation which then goes bankrupt, the lineup of beneficiaries willing to defend the trustee on the basis that the asset had special value to them is likely to be a short one. It is often the case that some or all of the beneficiaries will have a much less sentimental view of the family business than a testator who devoted his working life to it. For that reason, trustees are advised to canvas the relevant beneficiaries as to the importance they attach to continued ownership of shares in the family business (or any other corporations). The best case scenario will be the informed signed consents of all the beneficiaries, after they have received independent legal advice, to whatever course the trustee intends to take.

Should the trustee be opposed by beneficiaries or take a course which proves unsuccessful, he will need to make the case, preferably by reference to the Will or trust document, that the special value of the shares in question either outweighed or was supported by the other factors trustees are directed to consider in subsections 27(5) and (6) of the *Trustee Act*. It is not enough to blindly maintain the practice of the testator: individuals are not bound by the prudent investor

rule. The sole (or majority) owner of a business has few constraints, and the prudent investor rule is not among them. The trustee, then, may well be receiving a business which is not organized prudently, or in which it would not be prudent to maintain the interest of the trust.

In the coming years, the Courts will no doubt illuminate the interaction and relative importance of the different factors of prudence that trustees are to ponder, and it is hoped that they may provide consistently applicable frameworks. However, one cannot help but predict that given the broadness of the factors to be considered, decisions are most likely to be made on a case-by-case basis, and the Courts are unlikely to provide strong direction regarding the general applicability of section 27 anytime soon.

Once the prudent investor priorities are considered and decisions are made by trustees, the question then becomes whether those decisions can be implemented by the corporation.

Duties of directors

Section 34(1) of the *Ontario Business Corporations Act*[7] provides the following definition of the standard of care expected of directors:

> (1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall,
>
> (a) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Paragraph 34(1)(a) is not surprising and in most cases should not be difficult to apply in the case of a director with no competing loyalties. However, the waters muddy where a director owes his position to his capacity as the trustee of a

[7] R.S.O. 1990, c.B.16.

shareholding trust. With dual duties added to the factual mix, what might otherwise seem an honest good faith decision with a view to the best interests of the corporation, such as the declaration of a substantial dividend, could be criticized by third-party shareholders as having placed the trust's interests ahead of the corporation's.

Paragraph 34(1)(b) may cause problems for a trustee, because the level of care, diligence and skill required for a director of a given corporation may be higher than the trustee chosen by the testator is able to meet. An otherwise perfectly capable trustee may lack the care, diligence and skill required to be an effective director of an active corporation. In such a case the duty of the trustee must be to acquire the skill, or at least obtain sufficient advice to enable him to make informed, educated decisions.[8]

A duty which arises in the common law and by extension from the statutory codification of that common law duties to act honestly and in good faith is the duty to avoid conflicts of interest in acting as a director. The duty of a director to avoid placing her personal interests ahead of those of the corporation is relatively clear, both conceptually and in isolated application. In contrast, the duty to avoid conflict between the interests of the corporation and the interests of a trust can become a conceptual and practical quagmire with very few clear answers. Adding in more capacities to the same individual in the same situation, such as that of an officer, a shareholder of the corporation, or a beneficiary of the trust, may quickly create a maze of potential conflicts on both the theoretical and practical levels.[9]

Duty to become a director

Given the risks of conflict, an obvious question is why should the trustee become a director at all. The answer is that having assumed the trusteeship, he probably has no choice. If an estate holds a substantial or controlling interest in a

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[8] Morgan, Micheal C. *"The Trustee/Executor as Director of a Closely-Held Corporation"*, Canadian Bar Association, 1994 Institute of Continuing Legal Education, at 11-13.

[9] *Fasken Campbell Godfrey v. Seven-Up Canada Inc.* (1997), 47 O.R. (3d) 15 (Ont.C.A.) provides a concise illustration of such a maze.

corporation, and the trust provides for the continuation of the business of the corporation, the trustee in all likelihood has an obligation to become a director of the corporation to oversee the management of the estate's investment.[10] Such an obligation cannot be delegated, except in restricted circumstances, and even where some delegation may be permissible the trustee must in any event keep apprised of the corporation's performance and step in if necessary.[11] From a practical point of view it would seem that, since the trustee in all likelihood will be blamed by beneficiaries for any director misconduct, regardless of her level of involvement, the instinct of self-preservation should be enough to become a director. Rolling the dice on the conduct and character of other directors is not recommended in any situation.

Payment of compensation

With the duties of a director added to a trustee's already weighty burden, one could be forgiven for assuming that at least he will be well paid by the corporation for acting as a director. Anything less would be adding the insult of having to work for free to the injury of assuming extra duty and liability. The assumption of payment would be reasonable, but not necessarily accurate. The common law restricts payments to directors who derive their status as such through the use of the power given to them by the trust, unless the terms of the trust specifically authorize it.[12] Although the trustee may be able to collect a special fee for acting as a director, a case on point suggests that if the corporation does not pay for director's services, it would be unfair to punish the beneficiaries by causing them to pay.[13]

A trustee-director expecting director's remuneration in addition to trustee compensation would be well advised to secure the consents of all the beneficiaries or bring an application for the advice and direction of the Court as

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[10] *Supra note 4.*

[11] *Ibid*, and: Christopher Cant, "*Breaches of trusts, controlling interests in companies and nominee directors*", Trust Quarterly Review, Issue 1 Vol. 1, 2003, p.24.

[12] Patricia Robinson and Andrea Rowe: "Estate ownership of shares of a private company", 12 E.T.J. 25 at 35-39.

[13] *Bellomo (Re).* (1989), 36 E.T.R. 123 (Ont. Dist. Ct.).

soon as possible. Even with the consents of the beneficiaries, an application should probably still be brought, since a Court Order would be a bar against later arguments by the beneficiaries that they did not understand the total amount of the remuneration that would be paid, that there was no consideration for the consent, that they were the victims of a power imbalance, and so on.

Refusing to accept the trust

Not all named trustees choose to accept the trust. The potential duty to become a director should not be taken lightly by a trustee who may be considering whether to accept the trust. Arguably it will weigh heavily in favour of refusing. As outlined above, the rigorous, inflexible and complex fiduciary duties imposed on trustees are mirrored by an equally daunting regime governing directors.

Aside from the common-law fiduciary duties applicable to directors, there are numerous strict liabilities imposed on them by various corporate, labour, environmental and taxation statutes. The chance that a director may have to personally pay to clean up environmental contamination of the company's land, or personally remit source deductions to the Canada Customs and Revenue Agency can be somewhat mitigated by liability insurance. However, such matters are usually the farthest thing from a person's mind when he is considering whether to administer his relative's or friend's estate.

The additional role of director can be seen, to paraphrase a military term, as a "duty-multiplier", greatly increasing the responsibilities and potential liabilities of the trustee without necessarily increasing the compensation to be awarded. Not only are the duties greatly increased, but so are the objects in whose favour the duties are to be carried out. No longer can the trustee be safe by satisfying the beneficiaries; as director, she is beholden to shareholders, government agencies, regulatory bodies and any number of other persons. Estate solicitors should be very diligent in advising potential trustees of all of these risks, and further in putting to them the option of refusing the trust.

Eventually, of course, someone must be found who will accept the role.

Conflicts between director and trustee roles

It is helpful to list some factors[14] which can lead to inherent conflicts of interest faced by an individual who is both trustee and director:

1. Lifetimes – While corporations are not usually begun with the expectation that they will end at a certain time, trusts for the most part are. Therefore, what might make sense for a corporation from a long-term viewpoint, say investing profit into property or assets in the hopes of profiting in twenty years' time, could be useless to a trust whose term is five years in length (although not necessarily to the persons to whom the trust assets are to be distributed on dissolution of the trust).

2. Objectives – A corporation is generally free, through its directors, to reinvest its profit over time. While corporations are theoretically intended to ultimately benefit shareholders through dividends or capital appreciation, in practice, corporate, labour and taxation laws as well as corporate by-laws and shareholder agreements may make it impractical or impossible to regularly pay large dividends or redeem shares. The beneficiaries of a trust may chafe at a corporation's indefinite use of the trust's capital to pay employees', officers' and directors' salaries and bonuses and invest what profit is left in new assets and properties instead of paying dividends.

3. Risk – Successful corporations tend to take risks on an ongoing basis, while a trust and risk do not generally make for a happy couple:

   The underlying reason for the potential conflict when a trustee is also a director of a closely-held corporation (which is either controlled by or in which a significant interest is held by the trust) is inherent in the distinctly different objectives of trust and corporate law. Given that the corporate entity is the most important link for which the flow of capital

[14] This is not by any means an exhaustive list, merely some examples for the sake of illustration.

> is transferred to all areas of the economy, a considerable amount of discretionary latitude is generally given by a court to directors in the exercise of their duties.
>
> On the other hand, the institution of the trust is designed to conserve and protect capital. Although some discretion in performing this function is usually permitted by the terms of the trust instrument and by the law of trusts, the range permitted has been narrowed by the operation of trust law and, consequently, the trust is typically far less flexible than the corporation."[15]

Where an estate holds shares in a family-held corporation, it will often be the case that the chosen trustee will be the individual whom the testator sees as the most capable to run the corporation as well as administer the estate. That being said, the trustee will often be a beneficiary of the estate, already own shares in her own right, and may well be an officer in the corporation, all before death. For such a person, it may be difficult to fulfill both roles without running afoul of the duty to avoid conflicts of interest; and it may be impossible to avoid the appearance of conflict of interest.

Another difficulty that can arise is that the trustee can never fully predict how his death will change the dynamic of the corporation. It is often the case that the testator ran the family corporation for decades with an iron fist, based on certain principles which were, to the testator, immutable. For example, it might be that a testator believed in paying the officers (including himself) very high salaries and bonuses and no dividends on shares, or in paying as little out of the corporation as possible, or in taking gambles with the fortunes of the corporation. Once the testator is gone and the trust established, it may well be the prudent investor rules codified by section 27 which govern, not the testator's past practices, even if those practices were successful.

A complicating factor is that both trustees and directors must make investment and management decisions based on their judgment, decisions whose basis cannot always be objectively justified to beneficiaries or shareholders in retrospect. In the absence of the ability to show whether a decision was right or

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[15] Morgan, *supra* 7, at 16-17.

wrong, beneficial or harmful, fair or unfair, the best a fiduciary can hope for is that the corporation and trust both benefit so criticism will be muted.

Resolution of conflicts

A tug-of-war between the interests of the trust and the corporation, however problematic, must be resolved somehow. Paralysis of the trustee-director will only serve to cause a breach of duty to both trust and corporation. It is a consistent rule of the common law that the director role comes first, and must be carried out with a view to all the shareholders:

> It is indisputable that a director, whoever he is, must put first the interests of the company in all that he advocates and in his voting on the board, even if he knows that his arguments or his votes are not in the best interests of the trust or of some of its beneficiaries. Corporate law requires that he be a director first, and a trustee second.[16]

Therefore, when making decisions in the context of the running of the corporation, the trustee-director must look to the best interests of the corporation, including all its shareholders.[17] That should not be taken as evidence that the preceding and following discussion is irrelevant padding for an inevitable conclusion: if a trust has a controlling interest in the corporation it cannot be ignored, because, of course, it is part of the corporation and entitled to benefit from it. Should the corporate direction be completely inimical to that of the trust, the trustee will have to find a way to sell its shares, and if the corporation's directors refuse to allow a redemption or sale, there are corporate remedies for shareholders which the trustee can resort to.

More hats – officers, beneficiaries and shareholders

The more closely-held a corporation, and the more it qualifies as a "family business", the more the likelihood of problematic multiple roles. Often the

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[16] Waters, Donovan: The Law of Trusts in Canada, (2ed), (Toronto: Carswell, 1984) at 843.

[17] I will forego the temptation of adding to the well-developed line of discussion of whether the "best interests" of a corporation are identical to those of its shareholders, or are broader in scope to include employees, agents, and so forth.

person chosen as trustee by the founder of a family corporation will be the favoured child or sibling. In such cases that trustee may also be a beneficiary, and may already be a shareholder of shares outside the estate with different attributes than those held by the trust. The possibilities for conflict multiply exponentially, and in the family setting where calm and objective reasoning tends not to be the norm, suspicion, jealousy and acrimony will seldom take long to rear their ugly heads.[18]

The trustee-director who is also a paid officer or shareholder of a corporation, and therefore has a personal financial interest separate and apart from his fiduciary role, will be less insulated from beneficiaries by the argument that his duty as director cannot be subjugated to his duty as trustee. Since such multiple capacities do tend to be the norm in closely-held corporations, situations in which a trustee-director can rely on the director-first mantra will be limited.

It is primarily in these multiple-hat situations where the trustee-director may have a difficult time relying on the defence that he must be a director first and a trustee second. Taking the corporation in a direction which benefits (or appears to benefit) the trustee as an officer or beneficiary personally, but is of dubious utility to the shareholder trust, immediately opens the trustee up to criticism. Arguably, any significant income derived from the corporation will be enough to cast aspersions on the motives of the fiduciary acting as "director first, trustee second". It will be of limited assistance to the trustee to rely on the pre-death conduct of the testator and simply continue the status quo, because the legal relationship in most situations change dramatically at death.

[18] For a particularly interesting (and literate) discussion of family dynamics in the estate freeze context, see: John J. Chapman, "*Sharper than a serpent's tooth: estate freezes thirty years later*", Estates and Trusts Journal Vol. 16 at 47.

Dealing with the conflict

a) planning

It would be a rare article on any estate or trust topic that did not rely on the boilerplate cliché of careful estate planning as a marvelous tool to avoid problems, and this will be no exception. The existence of corporate complexities should be enough to overcome the drafter's burden that everybody wants the perfect estate plan but nobody wants to pay for it. The more the testator is able to anticipate problems and set out solutions in the trust deed, the more support the trustee-director will have in carrying out the testator's intent. It is no less true for being trite that solicitors are vital to this process, and they can use their imaginations as well as the caselaw to anticipate problems and, if need be, scare testators into accepting the utility of investing the time, effort and fees at the planning stage to avoid having their dreams shattered once they are gone and no longer able to step in and deal with unruly heirs.

b) multiple executors

Another solution which is hardly novel is that of multiple executors, a majority of which, if feasible, should have no beneficial interest in the estate and own no shares in the corporation. This allows the "pure" trustee-directors to outvote the "corruptible" one(s) should it be necessary. Another benefit of this arrangement is that it can give the impression to beneficiaries that a majority of the trustees are unbiased; often the appearance of fairness is just as important as whether it objectively exists.

c) Disclose early, disclose often

While the information that directors must provide to shareholders has defined limits, trustees are in a different position. Subject to some very limited exceptions, beneficiaries are entitled to virtually any and all information relevant to the administration of the trust. That right is arguably limited in terms of corporate information: it would be problematic for beneficiaries of a shareholding trust to have more rights that other shareholders. However, it may in the corporation's interest to allow the trustee-director to give out as much information

to the beneficiaries as possible, in as timely a fashion as possible.[19] Other shareholders should receive the same information at the same time. In many cases, plain and full disclosure on a timely and ongoing basis will be all it takes to avoid otherwise crippling litigation.

Disclosure of the trustee's plans and priorities as far as the trust's investment in the corporation and goals in terms of income from the corporation in the short, medium and long terms can certainly be disclosed. Regular updates on corporate events can be provided. Well-informed beneficiaries are likelier to be satisfied beneficiaries.

d) Get consent early, get it often

The practical benefit of obtaining informed written consent on a periodic basis from as many beneficiaries as possible is not circumscribed by the legal reality that their consent is usually not required. From the trustee's perspective, if the beneficiaries are asked for their views, instead of ignored, they may feel as though they are part of the process and be less prone to cause problems. Beneficiaries tend to assume that, if a trustee is unwilling or unable to justify his decisions, they may not be justifiable.

e) Advice and direction

While trustees and directors must make the ultimate decisions, they do not have to do so without first getting advice. Potential sources of advice for trustee-directors include solicitors, the corporation's officers, independent experts in the business of the corporation, accountants and even the beneficiaries themselves. If all else fails, the trustee-director can seek the guidance of the Court by application. There is a risk that the trustee-director will be criticized and ordered to pay costs for asking the Court to resolve questions of trustee discretion, but this can sometimes be a small price to pay to obtain the implicit finding that the trustee is empowered and entitled to make the decisions at issue.

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[19] Obviously it is not suggested that secrets or potentially harmful information be divulged, but free flow of information will be harmless in most cases.

Conclusion

The analysis must return, as it inevitably does in most estate or trust discussions, to the testator's intent. Shares in a closely-held corporation often represent the lifework of the testator: the trust represents her desire to pass on that work and its bounty. As a starting point, the simple fact is that, had the testator wished to create an estate plan that did not involve the ongoing operation of a business, she could have done so.

By implication, the creation of an estate plan which contemplates the continued operation of a business is a reflection of the importance to the testator of the business itself, or at least the testator's confidence in the business' future profitability.

It is not uncommon to find that a testator's devotion to his corporation matches or exceeds his devotion to his heirs, and the trustee has been chosen because of the testator's confidence in her ability to see the trust through, and resolve the competing interests honestly, in good faith, and in the ultimate best interest of the beneficiaries. In order to do so, the trustee-director must enter the potential morass of conflicts with full knowledge of the practical and theoretical pitfalls, and be able to rely on both legal and practical advice as to how best to avoid them.

AVOIDING PROBATE IN LAND TITLES

INTRODUCTION

Given the significant increase in the value of real estate and Probate Fees (Estate Administration Tax) over the past 10 years, not having to pay those taxes can amount to a significant savings to the Estate and its beneficiaries. The question then arises as to under what circumstances will it be necessary to obtain a Certificate of Appointment in order to convey a marketable title to a property, since the obtaining of a certificate will result in Estate Administration Tax being exigible on the Estate's Assets shown in the filed Application.

This is a question which in Ontario, in our twin universe land registration system, has at least two different answers.

UNDER THE REGISTRY SYSTEM

It is very clear that a Certificate of Appointment is not required when transferring property in the Registry System.[1] A registration of notarial copies of the will, the Affidavit of Execution, and Death Certificate, in the General Registry, prior to the registration of the Deed, together with the appropriate recitals in the deed including the registration number of the Testamentary documentation (G.R. number) will suffice. [2]

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[1] Hollwey and Adams [1926] 2 D.L.R. 960 (Ont. S.C.) at page 961
[2] Section 55 of the Registry Act, R.S.O. 1990, c. R.20

PLEASE NOTE: ***Readers are cautioned that this paper is not provided as legal advice or as a legal opinion but as information only. Readers are cautioned not to act on information***

Thus if your clients are lucky enough to buying or selling real estate still registered in the Land Registry system, obtaining a Certificate of Appointment is not necessary and the savings can be quite significant.

This set of circumstances is, however, becoming rarer as we move further into the world of Teranet and E-Reg.

UNDER LAND TITLES

This system of Land registration, as we are all well aware of in the era of electronic registration and Teranet, is becoming the dominant one.

Under it, the transfer of property by way of transmission applications is dealt with in Section 124 of the Land Titles Act. Under that Section, prior to the Red Tape Reduction Act of 2000, which was proclaimed on December 6, 2000, a Transmission Application required the use of Forms 40 and 41[3], in which an affidavit by the Applicant was required together with a notarial or certified copy of the letters probate or letters of administration. For your reference, I have included a copy of Form 40.

provided without seeking specific advice with respect to the particular situation. Please do not reproduce this paper without the writer's consent

[3] R.R.O. 1990, Reg. 690, s. 36(2)

Pursuant to the Red Tape Reduction Act provision has been made to allow evidence to be made in support of a Transmission application by way of a second method as well as by affidavit. Evidence can now be provided by a signed statement by a solicitor consistent with those provided for under the E-Reg system as well as by the aforesaid affidavit. In the case of a transmission by a personal representative reference is required in that statement as to the Court and File number of the Certificate of Appointment either with or without a will, so the assets of the Estate, including its Real Property, are once again caught by Estate Administration Tax.

I wish to point out here that one of the statements that a solicitor can provide is to advise that no application has been made for a certificate since the Estate is smaller than $50,000.00[4]. Accordingly it appears that in these circumstances it would be possible to register a transmission application without obtaining a Certificate of Appointment.

FIRST REGISTRATIONS AFTER PROPERTY CONVERTED TO LAND TITLES

It appears that there is another, more significant exemption to the requirement of having a Certificate of Appointment in order for an executor to transfer property in Land Titles. It occurs on the occasion of the first dealing of a property after it has been brought over from the Registry System.

[4] Section 124(2) of the Land Titles Act as amended by the Red Tape Reduction Act

This exemption has now become significant with the mass conversion of thousands of titles from the Registry System into the Land Titles System in order to facilitate electronic registration.

Under this exemption, a Certificate of Appointment is not necessary. Either by way of affidavit of the Applicant, or by way of written statement of a solicitor, which are consistent with those found under the Electronic Registration System, the Transmission Application must contain the following information:

(i) The property is a Ministry of Consumer and Commercial Relations conversion from Registry to Land Titles;

(ii) The transaction is the first dealing after the conversion of the Property;

(iii) The value of the estate is ________________.

(iv) The same evidence as under the Registry Act with regard to the execution of the Will and proof of death.

(v) The will is the last will and that a Certificate of Appointment of estate Trustee was not applied for;

(vi) The Testator was of the age of majority at the time of execution of the will and that the will has not been revoked by the marriage of the Testator or otherwise; and

either that the Debts of the deceased are paid in full or the property is subject to the debts of the deceased.

In addition to this information, a covenant to indemnify the Land Titles Assurance Fund must also be provided.

CONCLUSION

I point the above exemption out to you for good reason. Most solicitors, when they are retained by an estate trustee to act for them in the administration of an estate, immediately think of probate the moment he or she hears that the estate contains real property. If it is a first registration, a certificate of appointment is not necessary.

Should however, you proceed to obtain probate without making sure that the real estate is not in the registry system, or is exempt due the Transmission application being a first dealing with the land after conversion, you may cause the Estate to pay thousands of dollars of unnecessary Estate Administration Tax. This may in turn expose **you** to a claim by your client or clients against you, triggering a call to your insurer.

ATTACHMENTS

I have included the following precedents and information bulletins for your convenience:

(1) A copy of a draft indemnity agreement.

(2) An example of a transmission application dealing with first registrations after conversion.

(3) Bulletin 2000-6 of the Ministry of Consumer and Commercial Relations dealing with the effect of the Red Tape Reduction Act of 2000 and some of the Documentary requirements for Land Titles Estate Conveyancing.

(4) Form 40

COVENANT TO INDEMNIFY
THE LAND TITLES ASSURANCE FUND
(RE: Application No. __________)
(Section 55 of the Act)

This Agreement made the day of , 200?.

B E T W E E N:

NAME OF EXECUTOR?

- and -

HER MAJESTY in right of Ontario

WHEREAS Deceased registered owner? is the registered owner of the property municipally known was municipal address of property?, which property is more particularly described as legal description of property? ("the ?? property describer?? Property");

AND WHEREAS the title to the ?? property describer?? Property was converted from the Land Registry System to the Land Titles System on date of conversion?;

AND WHEREAS Deceased registered owner? died on date of death?, having executed a Last Will and Testament on date of will? in which she appoints name of executor appointed? as the Executor and;

AND WHEREAS a transmission application is to be registered on title in order to transfer the ?? property describer?? Property into the name of the Estate;

AND WHEREAS this registration will be the first registration after conversion;

AND WHEREAS, pursuant to Section 124, Regulation 690 of the Land Titles Act, this Covenant is required to affect such registration;

THE SAID name of executor appointed? as Executor and Trustee of the Estate of Deceased registered owner?, in consideration of the transfer of the ?? property describer?? Property, for the covenantor, the covenantor's administrators, executors and assigns, covenants with Her Majesty in right of Ontario, represented by the Director of Titles, that the said name of executor appointed? shall keep indemnified Her Majesty in right of Ontario, her successors and assigns, from and against all loss or diminution of the assurance fund under the *Land Titles Act*, or established or continued under any other Act of the Province of Ontario, in respect of any valid claim that may hereafter be made on account of the circumstances set out above and also against all costs in respect thereof and

will pay such amount as anyone claiming as aforesaid may be adjudged to be entitled to recover in respect of the premises and costs.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ______ day of ______________________________, 200?.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

______________________________ ______________________________
witness name of executor appointed?

X:\Jordan Word Documents\Firm\Precedents\Estate\REAL ESTATE MATTERS\COVENANT TO INDEMNIFY LAND TITLES.doc

Province of Ontario

Document General

Form 4 — Land Registration Reform Act

D

FOR OFFICE USE ONLY

(1) Registry [ ] Land Titles [X] (2) Page 1 of pages

(3) Property Identifier(s) Block Property Additional: See Schedule [ ]

(4) Nature of Document TRANSMISSION APPLICATION LAND TITLES SECTION 120/123, LAND TITLES ACT

(5) Consideration NIL Dollars $

(6) Description
Lot Plan City of Toronto (formerly City of North York), Land Titles Division of the Toronto Registry Office No. 66

New Property Identifiers Additional: See Schedule [ ]

Executions Additional: See Schedule [ ]

(7) This Document Contains: (a) Redescription New Easement Plan/Sketch [ ] (b) Schedule for: Description [ ] Additional Parties [ ] Other [X]

(8) This Document provides as follows:

hereby applies to the Land Registrar to be registered as owner as Executor of the land described as Lot 41, Plan 3296, City of Toronto (formerly City of North York), Land Titles Division of the Toronto Registry Office No. 66.

The evidence in support of this application consists of:

1. The affidavit of the applicant;
2. A notarial copy of the Proof of Death Certificate for issued by McDougall & Brown Funeral Home;
3. A notarial copy of the Last Will and Testament executed by on July
4. A Notarial copy of the affidavit of execution of the Last Will and Testament executed by
5. A notarial copy of the Proof of Death Certificate for issued by McDougall & Brown Funeral Home;
6. Covenant to Indemnify the Land Titles Assurance Fund.

Continued on Schedule [ ]

(9) This Document relates to instrument number(s)

(10) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y	M	D
		2003		

(11) Address for Service 614 Glengrove Avenue, Toronto, Ontario M6B 2H8

(12) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y	M	D

(13) Address for Service

(14) Municipal Address of Property
venue,
Toronto, Ontario M6B 2H8

(15) Document Prepared by:
BARRISTER & SOLICITOR
TORONTO, ONTARIO
M5H 3L5

FOR OFFICE USE ONLY

Fees and Tax	
Registration Fee	
Total	

Additional Property Identifier(s) and/or Other Information

AFFIDAVIT IN SUPPORT OF TRANSMISSION APPLICATION

(Section Land Titles Act)

I, of the City of Toronto, Province of Ontario, MAKE OATH AND SAY THAT:

1. I am the estate of who died on and who was seized of the real property described in Box (6) of the Document General to which this affidavit is attached, and as such have knowledge of the matters hereinafter deposed to.

2. ecame the registered owners of the subject property, as joint tenants, by Deed of Land registered on as Instrument No. NY

3. died on or about leaving as the surviving joint tenant.

4. the surviving joint owner of (formerly City of North York), and the said s entitled to have the name of the deceased, deleted from the Parcel Register.

5. At the time of his death, the said were spouses of one another and was at least eighteen years of age.

6. mentioned in Instrument the name which appears on the proof of death certificate are one and the same person

7. All of the debts of the Estate of have been paid and the creditors have been notifed.

8. died on or about January 21, 2003.

9. The said was not a spouse at the time of her death and was at least 18 years of age.

10. The said mentioned in Instrument No. and the name which appears on the proof of death certificate are one and the same person.

11. All of the debts of the Estate of have been paid and the creditors have been notifed.

12. The property is a Ministry conversion from Registry to Land Titles.

13. The transaction is the first dealing after the conversion of the property.

14. The value of the estate is $

15. A notarial copy of the Will executed by s attached hereto. The said Will is the Last Will and Testament and a Certificate of Appointment of Estate Trustee with a Will was not applied for. The testatrix was of the age of majority at the time of the execution of the Will, and the Will has not been revoked by the marriage of the testatrix or otherwise.

16. I am one and the same person as as described in the Will of dated

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Bulletin No. **2000-6**	*Land Titles Act*

Ministry of Consumer
and Commercial Relations

Date: December 20, 2000

Registration Division

To: All Land Registrars	**ESTATE DOCUMENTS**

The *Red Tape Reduction Act, 2000*, which was proclaimed December 6, 2000, amended sections 123 and 124 of the *Land Titles Act* which are the sections that deal with applications for survivorship and transmission applications. The amendment revokes the requirement to produce evidence in the prescribed manner and substitutes it with the requirement to register evidence specified by the Director of Titles. This will allow estate documents to be registered in a non-electronic format using statements made by a solicitor instead of filing evidence.

Pursuant to sections 123 and 124, it is hereby specified that evidence in the following manner must be registered:

I. SECTION 123 – SURVIVORSHIP APPLICATION

1) The current requirements for an application for survivorship i.e. completion of Forms 42 and 43 of Regulation 690.

OR

2) Use of the following statements:

i. The applicant(s) held the property as (a)joint tenant(s) with the deceased, or

ii. The applicant held the charge on joint account with right of survivorship with the deceased.

iii. By right of survivorship, the applicant(s) is(are) entitled to be the owner(s), as a surviving joint tenant(s).

iv. The date of death was (insert date).

Family Law Act Statements:

v. Section 26(1) of the *Family Law Act* provides that if a spouse dies owning an interest in a family residence as a joint tenant with a third party (and not their spouse), joint tenancy is deemed to have been severed immediately prior to the time of death. As a result, if the death occurred on or after March 1st, 1986, the application for survivorship must be supported by one of the following statements:

- The deceased and (insert name), a(the) surviving joint tenant, were spouses of each other when the deceased died.
- The deceased was not a spouse at the time of death.
- The property was not a matrimonial home within the meaning of the *Family Law Act* of the deceased at the time of death.

The above statements are consistent with those required for the electronic registration of an application for survivorship and can only be made by a solicitor. The solicitor must sign these statements.

II. SECTION 124 – TRANSMISSION APPLICATION

1) The current requirements for a transmission application pursuant to section 36(2) of Regulation 690 which provides for:

An application in Form 40 or Form 41 which is to include the required evidence pertaining to:

i. dower rights;
ii. spousal rights under the *Family Law Act*;
iii. the sex of the deceased;
iv. debts of the estate;
v. the heirs of the deceased; and
vi. such other matters as the Director of Titles may specify.

OR

2) Use of the following statements:

(a) Transmission by Personal Representative:

A transmission application by an estate trustee (with or without a will), executor or administrator must contain the following information in the form of a statement:

i. The applicant is entitled to be the owner by law, as estate trustee, executor or administrator of the estate of the deceased owner.
ii. Name and date of death of registered owner.
One of the following:
iii. The applicant is appointed as Estate Trustee with a will by (*enter name of Court*), under (*enter File number*), dated (*enter date*) which is still in full force and effect, or
iv. The applicant is appointed as Estate Trustee without a will by (*enter name of Court*), under (*enter File number*), dated (*enter date*) which is still in full force and effect, or
v. No application was made for a certificate of appointment of an Estate Trustee, as the total value of the estate of the deceased owner is not more than $50,000.
vi. Documentation regarding the death of (enter the deceased's name) which is sufficient to deal with this transaction, is attached to registration number (enter registration number).

Note: Statement (vi) is to be used where the documentation has been registered in the Registry Division of a land registry office and the property has subsequently been converted to Land Titles Converted Qualified. (See Section III below)

If no application for a certificate of appointment was made, a covenant to indemnify the Land Titles

Assurance Fund is required to be filed with the office of the Director of Titles using the prescribed form 54 from Regulation 690.

AND

vii. The property is subject to the debts of the deceased, or
viii. The debts of the deceased are paid in full.

b) Transmission by Devisee/Heir at Law:

A transmission application by a devisee or heir-at-law must contain the following information in the form of a statement:

i. The name and date of death of the owner.
ii. The applicant(s) is entitled to be the owner, as Devisee or Heir-at-Law.
iii. The interest of the deceased is now vested in all the beneficiaries of the estate of the deceased owner under the provisions of the *Estates Administration Act*, the *Succession Law Reform Act* and the *Family Law Act*.
iv. The property is subject to the debts of the deceased, or
v. The debts of the deceased are paid in full.
vi. Title to the land is not subject to spousal rights under the *Family Law Act*, or
vii. Title to the land is subject to spousal rights of the spouse (enter applicable name)

c) Transfer by Personal Representative:

A transfer by an estate trustee (with or without a will), executor or administrator must contain the following information in the form of a statement:

i. A statement that the transferor is entitled to transfer the land affected by the document under the terms of the will, if any, the *Estates Administration Act* and the *Succession Law Reform Act*, or
ii. This transfer is authorized by (enter name of Court), under (enter File number) dated (enter date) which is still in full force and effect.

iii. Title to the land is not subject to spousal rights under the *Family Law Act* with respect to the deceased, or
iv. Title to the land is subject to spousal rights of the spouse of (enter applicable Name).

v. The transferor has obtained the consent of all required parties, or
vi. No consents are required for this transfer.

Solicitors are responsible for ensuring that the provisions of the *Estates Administration Act* and the *Succession Law Reform Act* have been met and therefore it is not necessary to state the purpose of the transfer, e.g. for the purpose of paying debts or distributing the estate.

If it is necessary to obtain consents of any beneficiaries, the name(s) of the beneficiaries must be set out in the application since a search for executions is required for any beneficiary.

The above statements are consistent with those required for the electronic registration of a transmission application or transfer by a personal representative or devisee/heir-at-law and can only be made by a solicitor. The solicitor must sign the statements.

III. FIRST DEALINGS AFTER PROPERTY CONVERTED TO LAND TITLES

The following procedures may be used for transmission applications for the first dealing after the property has been converted to the Land Titles system where no application for a certificate of appointment of estate trustee has been applied for. Land Registrars are authorized to exempt the requirement of a certificate of appointment of estate trustee and the following must be included in the supporting affidavit by the applicant, or by way of statements from a solicitor:

i. the property is a Ministry conversion from Registry to Land Titles;

ii. the transaction is the first dealing after the conversion of the property;

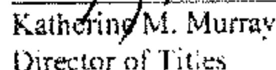
iii. the value of the estate is (enter value of estate);

iv. the same evidence as under the *Registry Act* with regard to the execution of the will and proof of death. If an affidavit of execution cannot be provided, a statement or affidavit made by someone who knew the deceased's handwriting may be used in lieu of the affidavit of execution. This should be someone of good standing within the community and must be someone who can state that they knew the handwriting of the testator. For example, a bank manager, an employer, or those individuals who can attest to an application for a passport. It cannot be a family member, a beneficiary or someone who can benefit from the estate;

v. that the will is the last will and that a certificate of appointment of estate trustee was not applied for; and,

vi. that the testator was of the age of majority at the time of the execution of the will, and that the will has not been revoked by the marriage of the testator or otherwise. (This is the current requirement in the Land Titles Procedural Guide (page 35,165) for situations where a certificate has not been applied for).

In all cases a covenant to indemnify the Land Titles Assurance Fund must be provided.



Katherine M. Murray
Director of Titles

Form 4D

The evidence in support of this Application consists of:

1. The affidavit of the applicant(s) (in compliance with subsection 36 (2) of this Regulation).

2. Letters probate or letters of administration or a notarial or certified copy thereof.

3. The consent of the Minister of Revenue under *The Succession Duty Act* being chapter 449 of R.S.O. 1970 (*where required*).

Dated ....

....
(signature of applicant(s) or solicitor)

The address of the applicant(s) for service is:

....

....

Form 40 LAND TITLES ACT

(For Registration of Executor or Administrator as Owner)

(Section 120, 121, 122 or 127 of the Act)

To: The Land Registrar for the Land Titles Division of ....

I (We), ..., the executor(s) of the last will and testament (*or* administrator(s) of the estate) of

....
(name of deceased)

hereby apply to be registered as owner(s) (as executor(s) *or* administrator(s)) of the (leasehold) land entered as (*or* Charge No.

.............., registered on) Parcel ...... in the Register for ....
(Where the application is under section 122 or 127 of the Act, make appropriate changes)