# UPDATE ON TAX ISSUES & TRUSTS

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**SHAM TRUSTS: A REMINDER**

Trusts offer a number of advantages in the estate planning context, from deferring taxes to sheltering assets from creditors. These advantages have resulted in trusts being used with increasing frequency. However, many clients do not necessarily understand or appreciate the proper purpose for and management of the trust vehicle. It is important to remember that if not properly constituted or carried out, a trust may be deemed void, and the intended advantages may be lost.

To establish a valid trust, there must be three certainties: the certainty of intention, the certainty of subject matter, and the certainty of objects.[1] In other words, the person setting up the trust (the settlor) must intend to divest himself or herself of certain assets, and intend those assets be held in the trust instrument for identified beneficiaries. Once the trust is settled the settlor no longer controls the assets. The assets are held for the benefit of the beneficiaries in accordance with the terms of the trust and are controlled by the appointed trustee(s).

Many clients wish to retain control over assets by:

1. becoming the sole trustee;
2. retaining veto power over others trustees; or
3. appointing a compliant trustee(s).

These types of arrangements should be treated with caution, as there is a high likelihood such trust arrangements would be deemed “sham trusts” and void as a result. If deemed void, whatever advantages for which the trust was created, will be lost.

A sham trust is one in which the settlor does not truly intend to dispose of the assets settled on the trust, but rather, merely wishes to create the impression that the assets have been disposed of, while in reality maintaining control of them throughout.

If a trust is challenged as a sham, the settlor and trustee(s) will be unable to rely solely on the wording of the trust agreement to illustrate their requisite certainty of intention.[2] The court is authorized to look further to the conduct of the settlor and trustee in setting up and managing

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[1] *Paul Antle* v. *Her Majesty the Queen* 2009 TCC 465 at [40] per Justice Miller.
[2] *Ibid*, at [44].

the trust to determine whether the trust was validly constituted. If it can be shown that both the settlor and trustee intended to deceive or misrepresent the actual transaction from the outset, the trust will be deemed a sham and will be void as a result.

In, *Paul Antle* v. *Her Majesty the Queen*[3] ("**Antle**"), the trial judge concluded that the respondent Mr. Antle lacked the certainty of intention in settling up an offshore discretionary trust. He held that Mr. Antle merely signed documents provided by his financial advisers with the goal of avoiding Canadian tax. As Mr. Antle did not intend to lose control of the shares settled on the trust nor access to the ultimate profits, the trust arrangement that resulted was deemed a sham.

On appeal, Mr. Antle did not challenge this finding of fact but submitted that the court could not go behind the trust deed itself, which impeccably described a proper discretionary trust. The Federal Court of Appeal dismissed Mr. Antle's appeal and reaffirmed the longstanding jurisprudence that a court may look to not only the words of a trust deed but also to all of the surrounding circumstances.[4]

In addition, after the Ontario Court of Appeal decision in *Duca Financial Services Credit Union Ltd. v. Bozzo*[5] *("**Bozzo**")*, not even a properly executed trust will be satisfactory evidence of intention. If a settlor fails to relinquish control of the trust assets the trust may similarly be deemed a sham.

In *Bozzo* the Ontario Court of Appeal found a trust to be a sham in the context of a bankruptcy proceeding. The respondent, Bozzo, settled a trust in 1988 confirming that he held shares in a company in trust for his wife. The company defaulted on a loan guaranteed by the respondent who was petitioned into bankruptcy in 1994. The trial judge accepted the respondent's submission that he intended to separate himself from ownership of the shares, and found that the trust was properly constituted. This conclusion, however, was overturned on appeal, by the Court of Appeal, which held that because the respondent maintained voting control of the company even after the date of the Trust Declaration, the trust was a sham. Control of the company was not altered by the trust. Mr. Duca was a creditor of Mr. Bozzo. In setting aside the Trust, Mr. Duca was allowed access to the assets that otherwise would have been protected by the trust.

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[3] 2009 TCC 465.
[4] *Antle v. R.,* 2010 FCA 280.
[5] 2011 ONCA 455.

Practitioners, settlors and trustees should also be mindful of section 75(2) of the *Income Tax Act*[6] ("***ITA***"). Broadly speaking s. 75(2) is intended to ensure that a taxpayer cannot avoid the income tax consequences of the use or disposition of assets by transferring them to a trust while retaining:

a. a right of reversion in respect of the assets contributed to the trust, or
b. the right to direct the disposition of the assets contributed to the trust.

This provision is clearly directed at situations where the settlor or a 'contributor' has not let go of control of the assets as was the case in *Bozzo*. It establishes strict rules surrounding the rights of settlors or contributors who contribute assets to a trust. According to the provision, any income or gain from the trust property is attributed to the person from whom the property, or property for which it was substituted, was received by the trust.

[6] R.S.C., 1985, c. 1 (5th Supp).

## TESTAMENTARY TRUSTS TAXATION

A testamentary trust is a trust that arises on and as a consequence of an individual's death. There are two categories of testamentary trusts. The first is a trust created under the express terms of a will, the 'testamentary trust', and the second is an 'estate', which automatically arises at common law upon the death of the testator. The latter recognizes that when an individual dies it often takes time to gather his or her assets and to undertake the steps required to administer the estate. As a result, at common law, the assets of the estate are held in trust despite the fact that no express trust was created under the will for such purpose.

Both trusts and estates are considered individual taxpayers under the *ITA* and are taxable on any income earned by the trust and estate and not paid or made payable in the year to the trust's beneficiaries. Traditionally, any taxable income earned in a testamentary trust or estate has been subject to the same graduated tax rates available to individuals.

By contrast, *inter vivos* trusts created after June 18, 1971 pay federal tax at the highest marginal tax rate applicable to individuals on all of their income. Only grandfathered *inter vivos* trusts, those created before June 18, 1971, are currently taxed at a similar graduated rate of return.

As the income earned within estates and testamentary trusts have traditionally been taxed on a separate tax return, many have used this favorable tax treatment as an opportunity to income split, significantly minimizing their overall taxes payable.

In its March 2013 Federal Budget, the Department of Finance voiced concern over this use of testamentary trusts as a tax-avoidance strategy and announced its intention to introduce changes which would eliminate graduated tax rates for testamentary trusts, estates and grandfathered *inter vivos* trusts.

Despite the objections of the Canadian Bar Association (CBA), the Chartered Professional Accountants of Canada (CPAC) and the Society of Trust and Estate Practitioners (STEP), the February 2014 Federal Budget followed through with the Department of Finance's communicated intention, and proposed legislation, which will eliminate the graduated rate taxation for testamentary trusts.

On August 29, 2014, the Department of Finance released draft legislative proposals. Pursuant to the proposed legislation, testamentary trusts, estates and grandfathered *inter vivos* trusts will

be taxable at a flat rate equal to the top federal personal tax rate of 29% (plus the top provincial or territorial tax rate) with only two exceptions:

a. An estate that is a testamentary trust will be exempt, and therefore will still be taxable at the graduated rate, for the first 36 months after the testator's death; and

b. A qualified disability trust, i.e. a testamentary trust with a beneficiary who qualifies for the disability tax credit, will still be eligible for graduated rates.

In addition, testamentary trusts (other than estates for their first 36 months) and grandfathered *inter vivos* trusts, will be required to have a December 31st taxation year-end. Testamentary trusts that do not already have a calendar year-end will be deemed to have a year that ends on December 31, 2015 (or in the case of an estate for which that 36-month period ends after 2015, the day on which that period ends).

In addition, testamentary trusts (other than estates for their first 36 months) and grandfathered *inter vivos* trusts, will now be subject to tax in quarterly installments.

Unless there are substantive changes made to the draft legislative proposals before they are enacted, these changes will take effect starting January 1, 2016.

## SPOUSAL ROLLOVERS TO BOTH COMMON LAW AND MARRIED PARTNERS

When an individual, who is resident in Canada, dies subsection 70(5) of the *ITA* provides for a deemed disposition of that individual's capital property at fair market value. This often results in capital gains tax being immediately payable by the deceased's estate.

However, subsection 70(6) of the *ITA* provides for a tax-free rollover, such that the deemed disposition of property will be deferred where the ownership of the property is transferred to (a) a spouse or common-law partner or (b) a qualifying spousal trust.

The spousal rollover will generally apply to transfers of property if (a) the deceased and the spouse or common law partner were resident in Canada (and the spousal trust is resident of Canada) immediately before the deceased's death and (b) the property vests indefeasibly within 36 months after the deceased spouse's death.[7]

There are four ways in which property can be rolled "as a consequence of death" to a

spouse or common-law partner:[8]

1. by will or other testamentary instrument;[9]
2. on an intestacy;[10]
3. by disclaimer, or release or surrender of a beneficiary under a will or on an intestacy;[11] and
4. as a consequence of provincial laws relating to the spouse or common-law partner's interest in certain property.[12]

The term spouse is not defined in the *ITA*, but is taken to mean a person to whom one is legally married.

The *ITA* was amended in 2000 to add common-law partners to every provision where the term 'spouse' appears. A common-law partner is defined in subsection 248(1) of the *ITA* to be a

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[7] An extension of this vesting period may be granted by the Minister of National Revenue within the 36-month period.

[8] See, Catherine Brown, 'Taxation on Death: Deemed Dispositions and Post Mortem Planning', Tax Law for Lawyers, June 2010, at 11. Viewed at: http://www.cba.org/cba/cle/PDF/Brown_Catherine_paper.pdf

[9] Income Tax Act, R.S.C., 1985, c. 1 (5th Supp), s 248(8)(a).

[10] *Ibid*, s 248(8)(a).

[11] *Ibid*, s 248(8)(b).

[12] *Ibid*, s 248(9.1) and (23.1).

person with whom one cohabits in a conjugal relationship and has either so cohabited for a period of at least one year or is the parent of a child of that person.[13]

Opposite sex and same-sex partners are considered to be common-law partners for tax purposes after a period of 12 months cohabitation.

It is possible for a person to have both a spouse and a common-law partner at a given time. For example where the deceased was legally separated but not yet divorced and had a common law partner at the time of death.[14] Provided all the conditions in subsection 70(6) are met in respect of the deceased taxpayer and the spouse or common-law partner, the subsection would apply to the property transferred to each of the spouse and common-law partner.[15]

If these conditions are met, the property is automatically deemed by subsection 70(6) to rollover to the spouse or common-law partner unless the spouse or common-law partner elects out of the rollover under subsection 70(6.2), in which case subsection 70(5) will apply.

[13] STEP Canada 16th National Conference, 2014 CRA Round Table, June 16-17, 2014 (Toronto), page 1-2.
[14] See, CRA document 2010-0373901I7 referenced in STEP Canada 16th National Conference, 2014 CRA Round Table, June 16-17, 2014 (Toronto), page 1.
[15] Supra note, 14 at page 1-2.

## IS A SPOUSAL TRUST TAINTED WHERE INCOME IS RECEIVED BY THE SETTLOR *INTER VIVOS*?

*Inter vivos* trusts are popular vehicles for the reduction of estate administration tax (probate fees), the maintenance of confidentiality and overall asset protection. A joint spousal or common-law partner trust is an example of such an *inter vivos* trust.

Subsection 248(1) of the *ITA,* defines 'a joint spousal or common law partner trust' as an *inter vivos* trust created after 1999 by a settlor who is 65 years of age or older at the time the trust is created.[16] Under the terms of such a trust, the settlor and the settlor's spouse or common-law partner are entitled to receive all the income that may arise from the trust before the later of their deaths. They are the only persons who can receive, or get the use of, any income or capital of the trust before the later of their deaths. Pursuant to the *ITA,* no other person may receive or obtain the use of any trust income or capital during their lifetimes.[17]

The assets are transferred to the trust on a tax-deferred basis. In other words, the trust takes over the asset at its cost; the tax on the gain is deferred until the disposition of the asset by the trust, or until the trust is terminated and the asset distributed to the beneficiaries. In other words, the transfer is tax neutral. There are no income tax advantages, nor any disadvantages. The settlor is also the trustee, so retains complete control over the assets until his or her death. He or she can name as beneficiaries of the trust on death whomever would have been beneficiaries under his or her Will, including charities. In addition, the trust can hold all or only portions of the client's estate.

If the terms of the trust provide that the taxpayer who transferred property to the trust is entitled to receive all of the income of the trust during his or her lifetime and the surviving spouse or common-law partner is only entitled to receive the trust's income after the death of the taxpayer and no other person could, before the later of those deaths receive or otherwise obtain the use of any of the income or capital of the trust, this, in and of itself, would not prevent the trust from qualifying as a "joint spousal or common-law partner trust".[18]

There is no requirement that the two persons be entitled to receive income in combination with the other.

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[16] *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp), section 248(1).
[17] STEP Canada 16th National Conference, 2014 CRA Round Table, June 16-17, 2014 (Toronto), page 2-3.
[18] *Ibid.*

## WHEN WILL A NON-RESIDENT TRUST BE CONSIDERED A RESIDENT UNDER THE INCOME TAX ACT, S.94?

On June 26, 2013, Bill C-48 (a tax bill that included revised rules for the taxation of non-resident trusts in Canada) received Royal Assent. Retroactive to January 1, 2007, the non-resident trust rules (the "**NRT Rules**") amended section 94 of the *ITA* and established measures to restrict the use of offshore or non-resident trusts as a means of limiting or deferring the payment of income taxes in Canada.

Given that a trust is deemed to be an individual, if a trust is resident in Canada or deemed to be resident in Canada, it is liable to tax on its worldwide income under s. 2(1).

A non-resident trust is deemed resident in Canada where there is:[19]

- a "resident contributor" to the non-resident trust; or
- a "resident beneficiary" under the trust

A resident contributor to a trust means a person that is resident in Canada and has made a contribution to the trust.[20] An individual resident in Canada for a period of (or periods, the total of which is) 60 months or less, is exempted from treatment as a "resident contributor". This is known as the "immigrant trust exemption".[21] Practitioners should note, however, that the February 2011 Budget has proposed the elimination of the immigrant trust exemption.[22]

The term "resident beneficiary" means a person (other than a successor beneficiary or exempt person) that is a beneficiary under the trust if the person is resident in Canada **and** there is a connected contributor to the trust. The term "connected contributor" is defined in the *ITA* to include an individual (other than a trust) who was previously a resident of Canada for not more than 60 months, or a non-resident.

In certain circumstances, a transfer or loan of property made directly or indirectly by the Canadian-resident taxpayer to a non-resident trust will be treated as a transfer or loan of

[19] See, Canada Revenue Agency, Trust Administrators: Types of Trusts. Viewed online at http://www.cra-arc.gc.ca/tx/trsts/typs-eng.html
[20] *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp), section 94.
[21] STEP Canada 16th National Conference, 2014 CRA Round Table, June 16-17, 2014 (Toronto), page 17.
[22] *Ibid.*

restricted property. The Canadian-resident taxpayer will be treated as having made a contribution to the trust and the deemed residence rules will apply to the trust.[23]

A discussion of section 94 of the *ITA* would not be complete without mention of the 2012 Supreme Court of Canada decision in *Fundy Settlement* (also known as *Garron* or *St. Michael Trust Corp.*).[24] Since the court determined that the trusts were resident in Canada under a common law test of central management and control (as opposed to the historic test emphasizing the residence of the Trustees)[25], it indicated that it was unnecessary for it to comment on the alternative arguments of the Canada Revenue Agency under section 94 and GAAR. The court noted that its silence in this regard should not be taken as an endorsement of the Federal Court of Appeal's treatment of these issues. Accordingly, there remains uncertainty as to whether the Supreme Court of Canada would apply GAAR to deny treaty benefits in similar situations where a trust has central management and control outside of Canada, or whether tax treaties would override the rule in section 94 that may generally deem a non-resident trust to be resident in Canada. With respect to the latter issue, draft section 4.3 of Canada's *Income Tax Conventions Interpretation Act* will, if enacted, ensure that tax treaties do not override the rule in section 94 by generally deeming affected trusts to be resident in Canada, and not resident of the other contracting state, for purposes of applying Canada's tax treaties.[26]

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[23] Supra note, 23.
[24] *Garron Family Trust (Trustee of) v R*, (sub nom *St Michael Trust cop, as trustee of Fundy Settlement v R*), 2012 SCC 14.
[25] *Trustees of Thibodeau Family Trust v. The Queen*, 78 DTC 6376 (FCTD).
[26] See, Osler Publication, '*Supreme Court of Canada Decides on Trust Tax Residency'*, April 13, 2012.
Viewed at: http://www.osler.com/NewsResources/Supreme-Court-of-Canada-Decides-on-Trust-Tax-Residency/?langtype=4105

## TAXATION OF THE DISTRIBUTIONS OF CAPITAL AND THE ELECTION UNDER *ITA* 107(2)

When a trust transfers property to a beneficiary, that transfer is deemed disposition within the *ITA.* Normally, dispositions attract capital gains tax if the fair market value of the asset exceeds its adjusted cost base at the time of transfer. However, section 107(2) of the *ITA* permits a trust to transfer property to a beneficiary in certain circumstances on a tax deferred basis. When subsection 107(2) applies, the trust property distribution is based on the adjusted tax basis of the property rather than its fair market value upon distribution. The beneficiary's tax basis in the property is equal to the tax basis of the trust. The result is that the inherent tax in the distributed property is deferred until the earlier of the death of the beneficiary[27] or disposition of the property by that beneficiary.

Section 107(2) applies if:

1. the distribution is of property by a personal trust to a beneficiary resident in Canada[28] in satisfaction of his or her capital interest in the trust.[29]
2. the trust is not subject to paragraph 104(4)(a) of the *ITA*;
3. subsection 107(4.1) is not applicable; and
4. the trust has not made any election pursuant to subsection 107(2.001).

The distribution must be made in accordance with the trust terms and at the trustee's responsibility.[30]

A trust resident in Canada[31] may elect out of the rules in subsection 107(2) by, as noted above, filing an election under 107(2.001). The effect of this election is that subsection 107(2) does not apply but, rather, subsection 107(2.1) applies. Subsection 107(2.11) provides that where

[27] Subject to further deferral by using spousal rollover.
[28] If the beneficiary is not resident in Canada, subsection 107(5) applies and tax is triggered in the trust.
[29] See, subsection 108(1) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp); See also, the judgment of Bonner J in *Chan v R.* 99 DTC 1215 (TCC) regarding the meaning of distribution.
[30] See also, the judgment of Bonner J in *Chan v R.* 99 DTC 1215 (TCC) regarding the meaning of distribution; STEP Canada 16th National Conference, 2014 CRA Round Table, June 16-17, 2014 (Toronto), Q. 8, page 13.
[31] A beneficiary of a non resident trust may elect out of the rules in 107(2) by filing an election under 107(2.002) such that the rules in s 107(2.1) apply to the disposition.

subsection 107(2.1) applies the trust can file an election for certain distributions with the result that the gains will be included in the income of the trust rather than the beneficiary.[32]

In the June 2014 STEP CRA Roundtable, STEP asked whether the section 107(2.001) election applied to all the property distributed to a beneficiary or whether the trust could elect on a property by property basis.

CRA responded first by providing circumstances where subsection 107(2.001) will allow a trust to elect out of the rules in section 107(2). CRA indicated that subsection 107(2.001) allows the trust to elect out of the rules in subsection 107(2) (i.e. have subsection 107(2.1) apply) where:

a) the trust is resident in Canada at the time of the distribution
b) the property is taxable Canadian property; or
c) the property is capital property used in, eligible capital property in respect of, or property described in the inventory of a business carried on by the trust through a permanent establishment (as defined by regulation) in Canada immediately before the time of the distribution.

Where subsection 107(2.1) applies the trust will be deemed to have disposed of the property for proceeds equal to the fair market value and the inherent gain will be taxed to the trust at the time of distribution. The beneficiary is treated as receiving the property at a cost equal to the fair market value at the time of transfer from the trust.

Second CRA responded that subsection 107(2.001) refers to a singular property.[33] In summary, the election can be used in respect of all the property distributed but cannot be made in respect of a fraction of a share unless the share was legally subdivided prior to the distribution date.

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[32] STEP Canada 16th National Conference, 2014 CRA Round Table, June 16-17, 2014 (Toronto), Q.18, page 25.
[33] *Ibid.*

## TRUST AUDITS: AREAS OF CONCERN

Trusts are often used for sophisticated estate planning purposes. Properly created trusts can be of substantial utility to clients and their families. However, in order for those benefits to be available:

1. the trust must be properly constituted (in accordance with the three certainties);
2. the trust should be evidenced in writing,[34]
3. detailed records should be kept documenting all transactions involving the trust assets or trust property; and
4. proper legal and tax accounting must be completed each year.

From time to time the CRA undertakes audits in relation to trusts. One particular area of concentrated investigation continues to be the receipt of trust property being settled on a trust.[35] CRA has suggested that often, while the three certainties are achieved on a trust, certain trusts never actually received settlement property, and therefore those trusts are not validly created.

At the STEP/ CRA Roundtable in June of 2014, STEP asked CRA to provide an update on the most common audit issues that it finds / reviews regarding trusts?

The responses of CRA included that it:

1. has recently applied section 105(1) of the *ITA* to impute a taxable benefit from a trust to a taxpayer;

2. denied a charitable deduction under section 118.3 of the *ITA* when the words of a Will did not specifically allow estate trustees to make a charitable gift;

3. applied section 75(2) of the *ITA* to tax income and gains of a trust to the settlor;

4. denied the deduction of carrying charges (accounting and legal fees) though the denial cannot be generalized;

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[34] Though there are some circumstances where a trust that is not in writing can be legally valid.
[35] For example, *The Queen v Sommerer*, 2012 FCA 207.

5. denied a late filed election under section 104(21) of the *ITA* in respect of the adult children beneficiaries of a trust one the basis that one of the requirements under subsection 104(21) of the *ITA* is that the amount designated can reasonably be considered to have been included in computing their respective incomes for the year; and

6. has provided advice on a number of audits where the issue of the potential application of the "stop-loss" rule in subsection 112(3.2) of the *ITA* that can reduce the loss of a trust on the disposition of a share is in question. In this case the transaction involved section 164(6) of the *ITA*, also a section that we know that CRA has been watching closely along with pipeline post mortem tax planning.

## CHANGES IN ESTATE ADMINISTRATION TAX

The latest changes to the *Estates Administration Tax Act*[36] ("***EATA***"), first proposed by the 2011 Ontario Budget[37], came into force on January 1, 2013. The changes have created a new audit and reassessment regime that creates more onerous obligations for estate trustees and calls for increased diligence in the execution of their duties.

### *Duty to Give Information*

One controversial change surrounds section 4.1(2) of the *EATA*, which creates a duty for the estate trustee to provide the Minister of Finance with additional information as prescribed under the Regulations upon application for a Certificate of Appointment. As the associated Regulations have not yet been publicized, it is unclear precisely what additional information will be required under this section. However, there is significant concern that this new provision will force estates to incur additional costs, for example appraisal costs for certain assets, in order to comply with the provision.

The Regulations are anticipated to come into force January 1, 2015. Until the Regulations take effect, there is no requirement for estate trustees to submit additional information to the Ministry upon application for Certificate of Appointment.

### *Assessment of EAT payable*

The amendments also empower the Minster of Revenue, under section 4.2 of the *EATA*, to conduct audits with respect to an estate and the estate trustee's compliance with correct the required estate administration tax ("**EAT**").

Pursuant to sections 4.2 – 4.4, the Minister may now assess or reassess an estate for four years after the day on which the Estate's EAT was payable[38] or at any time in the event the estate representative has failed to provide information in a timely way or has made a misrepresentation due to neglect, carelessness or willful default or has committed fraud in supplying required information.[39]

This provision increases the estate trustee's risk of having to pay additional EAT years after

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[36] S.O. 1998, c. 34, Schedule 14.
[37] Better Tomorrow for Ontario Act (Budget Measures), S.O. 2011, Schedule 14.
[38] Supra note 39, section 4.5(1).
[39] Supra note 39, section 4.5(2).

their role, as estate trustee, is essentially complete. It is therefore recommended that records and files substantiating estate values and the estate trustee's actions throughout the administration be kept on file for at least four years following application to the Ministry.

### *Offense Provisions*

The *EATA* also implements new offense provisions which include penalties and prison terms for estate trustees in non-compliance and those assisting them.

Pursuant to section 5.1 of the *EATA*, it is now a statutory offence for an estate trustee to fail to make the required filing and for any person to make, or assists in making, a false or misleading statement. The fine can range from a minimum of $1,000 to a maximum of twice the EAT payable.[40]

### *Response to New Requirements*

To reduce the exposure of estates to an audit by the Minister of Finance, estate planning methods that reduce or eliminate the need for probate can be implemented.

Some examples of such estate planning include:

1. Establishing *inter vivos* trusts to ensure assets pass outside of the estate upon death.
2. Designating beneficiaries for assets such as insurance policies, RSPs, RIFs, TFSAs and so that these assets will fall outside the estate and therefore will not be subject to probate.
3. The use of multiple wills to remove certain assets from being subject to probate fees.
4. Holding property, bank accounts and investments jointly with an intended beneficiary such that the assets will transfer by right of survivorship without the need for probate.

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[40] *Ibid*, section 5.1(4).

## THE LAW COMMISSION'S CONSULTATION PAPER ON SIMPLIFIED PROCEDURES FOR SMALL ESTATES

When an individual dies in Ontario, his or her Estate Trustees (named or appointed) often need to obtain a Certificate of Appointment of Estate Trustee (previously known as "probate") in order to deal with the Estate's assets.

In order to obtain a Certificate of Appointment the Estate Trustee(s) must apply to the Superior Court. When this application is made, a fee (often referred to as a 'probate fee" or the "estate administration tax") will be payable to the Court. Ontario has the highest probate fees of all the Canadian provinces, starting at $5 per $1,000 for the first $50,000 of the estate assets and $15 per $1,000 thereafter.

The existence of a Certificate of Appointment provides comfort and security to third parties (like banks, investment institutions and persons interested in buying the deceased's real or personal property from the Estate Trustees) as it effectively certifies that the person with whom they are dealing is authorized to deal with the assets. Therefore, third parties will often require the Estate Trustees obtain this Certificate.

Where the value of an estate is relatively small, the cost of obtaining the Certificate is often perceived as prohibitively expensive. As a result, the Estate Trustees of these small estates often administer the assets without the protection of probate and, in some cases, even choose not to administer the estate at all, resulting in the abandonment of assets altogether.

Accordingly, the Law Commission of Ontario ("LCO") has been actively investigating whether simplified probate procedures for small estates would make sense for Ontario.

On September 18, 2014 the LCO released a Consultation Paper[41] outlining Ontario's existing probate process and compares it to the specialized small estate processes currently being applied in other jurisdictions. The release of this Consultation Paper, has initiated the public consultation process. The LCO is currently accepting submissions from the public, including estate representatives, beneficiaries, creditors, financial institutions, policy makers, estate lawyers and anyone else who has been or is involved with Ontario's probate system. Submissions can be made, formally and informally, until December 11, 2014.

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[41] Available online at: http://lco-cdo.org/en/small-estates-consultation-paper

In addition, the LCO has also released a short Questionnaire[42] for Ontarians who have administered what they consider small estates and wish to be involved, but who may not wish to make a formal submission.

With the benefit of this consultation process, the LCO will prepare a final report with recommendations on whether a simplified process would facilitate the administration of small estates in Ontario and, if so, the suggested design for that process. The LCO will benefit from the responses of the professions and others who have had direct experience with small estates in Ontario. The submissions are important to the success of the project and we encourage you to share your experience and views with the LCO.

[42] Available online until December 11, 2014 at: http://www.lco-cdo.org/en/small-estates-consultation-questionnaire