



HULL & HULL LLP

**ESTATE, TRUST AND CAPACITY LAW
BREAKFAST SERIES**

**Preparing Estate Accounts – A “Hands-On”
Overview – Part II**

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January 18, 2006

ACCOUNTS FOR THE ESTATE

OF

F. GAVIN

SAMPLE

FOR THE PERIOD

FROM

JANUARY 31, 2004

TO

DECEMBER 31, 2005

THE ESTATE OF F. GAVIN

INDEX

<u>ITEM</u>		<u>PAGE NUMBER</u>
1	List of Original Assets as at January 31, 2004	1 - 2
2	Reconciliation	3
3	Capital Receipts	4 - 5
4	Capital Disbursements	6
5	Revenue Receipts	7 - 8
6	Revenue Disbursements	9
7	List of Unrealized Original Assets	10
8	Investment Account	11 - 12
9	Statement of Investments on Hand	13
10	Liabilities	14
11	Statement of Compensation	15 - 16

THE ESTATE OF F. GAVIN

LIST OF ORIGINAL ASSETS AS AT JANUARY 31, 2004 (DATE OF DEATH)

<u>ASSET TYPE</u>	<u>VALUE</u>	<u>HOW DISPOSED</u>
BONDS		
40,000 Canada Savings Ser. 48 - 6.00% - due November 1, 2010 (regular interest bonds - pays annually)	\$ 40,000.00	CR 9
Accrued interest on \$40,000.00 - Canada Savings Bonds	600.00	CR 9
75,000.00 Gov't of Canada - 7.50% due June 30, 2008 (regular interest bonds - pays semi-annually)	76,125.00	UNREALIZED
Accrued interest on \$75,000.00 - Gov't of Canada Bonds	468.75	CR 11
STOCKS		
3,000 shares of BCE Inc.	147,000.00	
-- 1,500 shares remain		UNREALIZED
-- Partial realization - 1,500 shares		CR 10
500 shares - Myown Co. Ltd.	1.00	UNREALIZED
BANK ACCOUNTS and FUNDS ON DEPOSIT		
Toronto Dominion Chequing account #760492 Accrued Interest T.D. account #760492 (nil)	8,353.42	CR 6
Canada Trust Savings account #4906634	7,836.42	CR 7
Accrued interest Canada Trust account #4906634	6.53	CR 7

THE ESTATE OF F. GAVIN

<u>ASSET TYPE</u>	<u>VALUE</u>	<u>HOW DISPOSED</u>
MISCELLANEOUS		
Canada Pension Plan death benefit	2,500.00	CR 3
Canada Pension Cheque for January 2004	347.26	CR 1
Old age Security Cheque for January 2004	387.56	CR 2
2000 Buick; LeSabre - serial #XD4YM666BTO	15,000.00	CR 8
 REAL ESTATE		
1212 Onthe Rd., Toronto (Outstanding mortgage - TD Canada Trust \$249,575.00 - mortgage insured)	536,000.00	UNREALIZED
TD Canada Trust Mortgage Insurance	249,575.00	CR 4
 PERSONAL EFFECTS		
Miscellaneous furniture and personal effects	14,769.00	CR 5
<hr/>		
TOTAL ASSETS	\$ 1,098,969.94	
Mortgage Liability	(249,575.00)	CD 1
TOTAL LESS LIABILITIES	<u>\$ 849,394.94</u>	

THE ESTATE OF F. GAVIN

RECONCILIATION

Capital Receipts	\$	434,115.71	
Capital Disbursements	\$	<u>310,246.64</u>	
Balance			\$ 123,869.07
Revenue Receipts	\$	17,121.32	
Revenue Disbursements	\$	<u>14,888.49</u>	
Balance			<u>2,232.83</u>
Total Credit Balance	\$		126,101.90
Amount Invested			<u>94,725.00</u>
Balance After Investments	\$		31,376.90
Amount in Bank			<u>31,376.90</u>
Difference	\$		<u><u>0.00</u></u>

THE ESTATE OF F. GAVIN

CAPITAL RECEIPTS

<u>Item No.</u>	<u>Date</u>	<u>Description</u>	<u>Amount</u>
1	5-Feb-05	Realized - Canada Pension cheque for January 2004	\$ 347.26
2	5-Feb-05	Realized - Old age Security Cheque for January 2004	387.56
3	10-Feb-05	Realized - Canada Pension Plan death benefit	2,500.00
4	10-Feb-05	To record receipt of funds re TD Canada Trust mortgage insurance on 1212 Onthe Rd., Toronto	249,575.00
5	10-Feb-05	To record distribution of personal effects	14,769.00
6	15-Apr-05	Realized - Toronto Dominion chequing account #760492	3,628.42
7	16-Apr-05	Realized - Canada Trust Savings account #4906634 (\$7,836.42) plus accrued interest to date of death (\$6.53)	7,842.95
8	17-Apr-05	To record realization of 2000 Buick Lesabre -- distributed to Mrs. Mary Gavin as per terms of Will (see CD # 3)	15,000.00
9	1-May-05	Realized - \$40,000.00 - Ser. 48 Canada savings bonds due Nov. 1/2010 plus accrued interest to date of death	40,600.00
10	3-May-05	Realized on sale of 1,500 shares of BCE inc. at \$59.75 less broker fee - \$201.25)	89,423.75
11	30-Jun-05	Realized accrued interest on \$75,000.00 Gov't of Canada - 7.5% due June 30/99	468.75
12	1-Oct-05	Refund from Receiver General re-deceased T-1 return	216.77

THE ESTATE OF F. GAVIN

CAPITAL RECEIPTS

<u>Item No.</u>	<u>Date</u>	<u>Description</u>	<u>Amount</u>
13	15-Dec-05	Profit on Sale of Solid Co.	9,200.00
14	15-Dec-05	Profit on sale of \$5,000.00 Ontario Hydro Bonds	156.25
Total Receipts			<u>\$ 434,115.71</u>

THE ESTATE OF F. GAVIN

CAPITAL DISBURSEMENTS

<u>Item No.</u>	<u>Date</u>	<u>Description</u>	<u>Amount</u>
1	10-Feb-05	Payment of mortgage outstanding	\$ 249,575
2	10-Feb-05	To record distribution of personal effects	14,769.00
3	16-Apr-05	Minister of Finance Estate Administration Tax	3,925.00
4	16-Apr-05	Reimbursement to Estate Trustee re payment to Deep-Six Funeral Home - Payment of Account	8,353.42
5	17-Apr-05	To record distribution of 2002 Buick Lesabre to Mrs. Mary Gavin as per terms of Will	15,000.00
6	15-May-05	Buoy, Dewey, Shaftum and Howe - Legal Fees re: application for probate	3,295.62
7	15-Jul-05	Receiver General - Balance of T-1 tax owing for 2003 tax year	642.18
8	15-Jul-05	Receiver General - tax owing re: terminal T-1 return to January 31, 2004	3,986.42
9	15-Dec-05	Loss on sale of Flake Co.	5,700.00
10	17-Dec-05	Mrs. M. Gavin - Encroachment re: auto repairs	5,000.00
Total Disbursements			\$ 310,246.64

THE ESTATE OF F. GAVIN

REVENUE RECEIPTS

<u>Item No.</u>	<u>Date</u>	<u>Description</u>	<u>Amount</u>
1	1-Mar-05	Div. On 3,000 shares of BCE Inc.	\$ 1,800.00
2	30-Mar-05	Interest on Estate bank account (pays quarterly)	5.83
3	30-Mar-05	Div - shares of Myown Co. Ltd.	252.00
4	16-Apr-05	Interest on Canada Trust savings account #4906634 from date of death to date of realization	18.29
5	4-May-05	Interest on \$40,000.00 Ser. 48 Canada savings bonds from date of death to date of redemption	600.00
6	1-Jun-05	Div. on 1,500 shares of BCE Inc.	900.00
7	30-Jun-05	Interest on \$75,000.00 Gov't of Canada - 7.5% - due June 30, 2008 (note - \$468.75 of this interest payment apportioned to Capital)	2,343.75
8	30-Jun-05	Div - shares of Myown Co. Ltd.	252.00
9	30-Jun-05	Interest on estate bank account	18.46
10	2-Jul-05	Interest on \$38,000.00 Canada Trust due July 2, 2005	265.47
11	31-Jul-05	Interest on \$50,000.00 Ontario Hydro - 6.9% due January 30, 2008	1,725.00
12	1-Sep-05	Div. On 1,500 shares of BCE Inc.	900.00

THE ESTATE OF F. GAVIN

REVENUE RECEIPTS

<u>Item No.</u>	<u>Date</u>	<u>Description</u>	<u>Amount</u>
13	30-Sep-05	Interest on Estate bank account	16.19
14	30-Sep-05	Div - shares of Myown Co. Ltd.	252.00
15	5-Nov-05	Interest on \$40,000.00 Royal Trust - 5.75% due May 5/07	1,150.00
16	1-Dec-05	Div. on 1,5000 shares of BCE Inc.	900.00
17	15-Dec-05	Accrued Interest on sale of \$5,000.00 Ontario Hydro Bonds	129.37
18	31-Dec-05	Interest on estate bank account	13.46
19	31-Dec-05	Interest on \$75,000.00 Gov't of Canada - 7.5% due June 30, 2008	2,812.50
20	31-Dec-05	Div - shares of Myown Co. Ltd.	252.00
21	2-Jan-06	Interest on \$35,000.00 Canada Trust - 5.5% due January 31, 2008	962.50
22	31-Jan-06	Interest on \$45,000.00 Ontario Hydro - 6.9% due January 31, 2010	1,552.50
Total Revenue Receipts			\$ 17,121.32

THE ESTATE OF F. GAVIN

REVENUE DISBURSEMENTS

<u>Item No.</u>	<u>Date</u>	<u>Description</u>	<u>Amount</u>
1	30-Apr-05	M. Gavin - Income Payment	\$ 3,500.00
2	5-May-05	Accrued Interest on purchase of \$50,000.00 Ontario Hydro - 6.9% due January 30, 2010	888.49
3	30-Jul-05	M. Gavin - Income payment	3,500.00
4	30-Oct-05	M. Gavin - Income payment	3,500.00
5	31-Jan-06	M. Gavin - Income payment	3,500.00
Total Revenue Disbursements			<u>\$ 14,888.49</u>

THE ESTATE OF F. GAVIN

LIST OF UNREALIZED ORIGINAL ASSETS AS AT DECEMBER 31, 2005

Bonds

75,000.00 Gov't of Canada - 7.5% due June 30, 2008	\$	76,125.00
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Stocks

1,500 shares of BCE Inc.		75,500.00
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500 Myown Co. Ltd.		1.00
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Real Estate

1212 Onthe Rd., Toronto		536,000.00
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Total (Value as at January 31, 2004)	\$	687,626.00
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THE ESTATE OF F. GAVIN

INVESTMENT ACCOUNT

<u>Item No.</u>	<u>Date</u>	<u>Description</u>	<u>Debit Account (Purchases and Gains)</u>	<u>Credit Account (Sales and Losses)</u>
1	02-May-05	Purchased \$38,000.00 Canada Trust short term - \$ 4.25% Due July 2, 2005	38,000.00	
2	05-May-05	Purchased \$40,000.00 Royal Trust GIC - 5.75% due May 5, 2007 (interest semi- annually)	40,000.00	
3	05-May-05	Purchased 200 shares in Solid Co. @100.00 plus broker fee \$300.	20,300.00	
4	05-May-05	Purchased \$25,000.00 - Ontario Hydro - 6.9% Due January 31, 2008 at 98.625 (interest semi- annually)	24,656.25	
5	05-May-05	Purchased 250 shares in Flake Co. @100/shr plus brokerage fee \$400	25,400.00	
6	02-Jul-05	Redeemed \$38,000.00 Canada Trust - short term - 4.25% due July 2, 2005		\$ 38,000.00
7	02-Jul-05	Purchased \$35,000.00 Canada Trust GIC - 5.5% due July 2, 2008 (interest semi-annually)	35,000.00	
8	15-Dec-05	Sold \$5,000.00 - Ontario Hydro - 6.9% due January 31, 2008 at 101.75		5,087.50
9	15-Dec-05	Transfer Profit on Sale of Hydro bonds to capital (see Capital Receipts #11)	156.25	

THE ESTATE OF F. GAVIN

INVESTMENT ACCOUNT

<u>Item No.</u>	<u>Date</u>	<u>Description</u>	<u>Debit Account (Purchases and Gains)</u>	<u>Credit Account (Sales and Losses)</u>
10	15-Dec-05	Sold 200 shares of Solid Co. @\$150, less broker fee \$500		29,500.00
11	15-Dec-05	Transfer Profit on Sale of Solid Co. to capital (see Capital Receipts #13)	9,200.00	
12	15-Dec-05	Sold 250 shares of Flake Co. @\$80, less broker fee \$300		19,700.00
13	15-Dec-05	Transfer Loss on sale of Flake Co. to capital (see Capital Disbursements #9)		5,700.00
		Subtotal	\$ 192,712.50	\$ 97,987.50
		Balance Invested		94,725.00
		Totals	<u>\$ 192,712.50</u>	<u>\$ 192,712.50</u>

THE ESTATE OF F. GAVIN

LIST OF ESTATE TRUSTEES INVESTMENTS ON HAND AS AT DECEMBER 31, 2005

Bonds

\$20,000.00 Ontario Hydro - 6.9% due January 31, 2010	\$	19,725.00
\$40,000.00 Royal Trust GIC - 5.75% due May 2007		40,000.00
\$35,000.00 Canada Trust GIC - 5.5% due July 2, 2008		35,000.00

Total

\$	<u>94,725.00</u>
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THE ESTATE OF F. GAVIN

LIST OF LIABILITIES AS AT DECEMBER 31, 2005 (end of accounting period)

<u>DESCRIPTION</u>		<u>AMOUNT</u>
Estate Trustee Compensation	\$	26,403.18
Costs on Passing of Accounts		2,191.50
Porcine and Associates - chartered accountants re: preparation of 2005 T-1 return and terminal T-1 return (note - account in dispute)		2,100.00
TOTAL	\$	<u>30,694.68</u>

THE ESTATE OF F. GAVIN

STATEMENT OF COMPENSATION

CAPITAL

Receipts	\$	434,115.71		
less refund - Item CR# 12		(216.77)		
less loss - Item CD#9		(5,700.00)		
		<hr/>		
2.5% on feeble capital receipts of	\$	428,198.94	x 2.5%	\$ 10,704.97
Disbursements	\$	310,246.64		
less loss - Item CD#9		(5,700.00)		
		<hr/>		
2.5% on feeble capital disbursements of	\$	304,546.64	x 2.5%	<hr/> \$ 7,613.67
Total Capital Compensation				\$ 18,318.64

REVENUE

Receipts	\$	17,121.32	x 2.5%	\$ 428.03
Disbursements	\$	14,888.49		
less Items #2 being accrued int. re bond purchase		(888.49)		
		<hr/>		
2.5% on feeble revenue disbursements of	\$	14,000.00	x 2.5%	<hr/> \$ 350.00
Total Revenue Compensation				\$ 778.03

CARE AND MANAGEMENT

Average Annual Market Value (see calculation below)	\$	831,561.42		
x .4% (or 2/5 of 1%)		3,326.25		
Number of Years		1.91		
		<hr/>		
Total Care and Management	\$	6,353.13		

Calculation of Average Annual Market Value

Original Assets	\$	849,394.94		
Assets at end of Accounting Period (unrealized original assets and trustee investments on hand)		813,727.90		
		<hr/>		
Total	\$	1,663,122.84		
Average	\$	831,561.42		

THE ESTATE OF F. GAVIN

STATEMENT OF COMPENSATION

Summary of Total Compensation

Capital	\$	18,318.64
Revenue		778.03
Care and Management		6,353.13
Total Compensation Claimable	\$	25,449.80

(NOTE!! add GST, if applicable)

Court file no. 02-12345/06

SAMPLE

ONTARIO

SUPERIOR COURT OF JUSTICE

THE HONOURABLE } day, the day
M } of , 2006

IN THE ESTATE OF F. GAVIN, deceased.

JUDGMENT ON PASSING OF ACCOUNTS

THIS APPLICATION WAS READ on day, the day
of , 2006 at 393 University Avenue, 10th Floor Toronto, Ontario M5G 1E6.

UPON reading the notice of application to pass accounts, the affidavit of service and the affidavit in support of an unopposed judgment on passing of accounts, as filed, and as there are no objections to the accounts or the claim for compensation by the estate trustee,

1. THIS COURT DECLARES that the estate accounts, as filed by the applicant for the period from January 31, 2004 to December 31, 2005, are hereby passed.
2. THIS COURT DECLARES that the capital receipts and capital disbursements of the applicant for the period are as follows:

CAPITAL ACCOUNT

Receipts	\$434,115.71
Disbursements	<u>310,246.64</u>
Credit (or debit) balance	<u>\$123,869.07</u>

3. THIS COURT DECLARES that the revenue receipts and revenue disbursements of the applicant for the period are as follows:

REVENUE ACCOUNT

Receipts	\$17,121.32
Disbursements	<u>14,888.49</u>
Credit (or debit) balance	<u>\$ 2,232.83</u>

4. THIS COURT ORDERS that the estate trustee shall be paid as fair and reasonable compensation for services as estate trustee of the estate and for disbursements expended in administering the affairs of the estate during the period the total amount of \$26,403.18 (no G.S.T. is applicable), of which \$17,602.12 shall be paid out of the capital of the estate and \$8,801.06 shall be paid out of the revenue of the estate.

5. THIS COURT ORDERS that the costs of the passing of the accounts allowed in accordance with Tariff C, and payable out of the capital of the estate, are as follows:

To the estate trustee \$2,000.00 and G.S.T. of \$140.00, plus disbursements in the amount of \$429.00, inclusive of G.S.T. for a total of \$2,569.00,

To: other costs

6. THIS COURT DECLARES that the Accounts show that there remains in the trustee's hands the original assets, investments and cash as set out in Schedule "A" attached.

(Signature of judge or registrar)

SCHEDULE "A"

ORIGINAL ASSETS

75,000.00 Gov't of Canada - 7.5% due June 30, 2008

1,500 shares of BCE Inc.

500 Myown Co. Ltd.

1212 Onthe Rd., Toronto

TRUSTEE INVESTMENTS

\$20,000.00 Ontario Hydro - 6.9% due January 31, 2010	\$ 19,725.00
\$40,000.00 Royal Trust GIC - 5.75% due May 2007	40,000.00
\$35,000.00 Canada Trust GIC - 5.5% due July 2, 2008	35,000.00

CASH

TD Canada Trust	<u>31,376.90</u>
TOTAL	\$126,101.90

Reconciliation:

Capital Credit Balance	\$123,869.07
Revenue Credit Balance	<u>2,232.83</u>
TOTAL:	\$126,101.90

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceedings commenced at Toronto

**IN THE MATTER OF THE ESTATE OF F.
GAVIN, deceased**

**JUDGMENT ON PASSING OF
ACCOUNTS**

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EXECUTORS' COMPENSATION A NEW TARIFF GUIDELINE?

By
Jordan M. Atin

Although not sanctioned by statute or regulation, executors, beneficiaries and courts have consistently calculated compensation by applying percentages to the value of the estate.

While s. 61 of the *Trustee Act* entitles executors to "fair and reasonable" compensation, the courts have approved the use of percentages as a *prima facie* indicator of fair and reasonable compensation. In conjunction with the use of percentages, a less mechanical and more discretionary approach referred to as the "five factors" is employed to ensure that the use of percentages actually produces a "fair and reasonable" figure. Those five factors are:

- a) the size of the trust;
- b) the care and responsibility involved;
- c) the time occupied in performing the duties;
- d) the skill and ability shown; and
- e) the success resulting from the administration.¹

The proper method of calculating compensation involving both the percentages and the five factors was recently confirmed by the Court of Appeal in *Re Laing Estate*², where it adopted the approach first set out by Killeen J. in *Re Jeffrey Estate*³:

"To me, the case law and common sense dictate that the audit judge should first test the compensation claims using the "percentages" approach and then, as it were, cross-check or confirm the mathematical result against the "five-factors" approach set out in *Re Toronto General Trust and Central Ontario Railway*, *supra*. Usually, counsel will, in argument, set out

¹ *Re Toronto General Trusts and Central Ontario R.W. Co.* (1905), 6 O.W.R. 350 (H.C.) at p. 354.

² (1998) 167 D.L.R. (4th) 150, 41 O.R. (3d) 571, 25 E.T.R. (2d) 139 (C.A.)

³ (1990), 39 E.T.R. 173 (Ont. Surr. Ct.)

a factual background against which the five factors can be brought to bear on the case at hand. Additionally, the judge will consider whether an extra allowance should be made for management, based on special circumstances. The result of this testing process should enable the judge to determine whether the claims are excessive or not and, in the result, will enable the judge to make adjustments as required. The process is not scientific but it is not intended to be: in the estate context, it is a search for an award which reflects fairness to the executor; in a real sense, the search is for an appropriate *quantum meruit* award in a unique setting.”⁴

In addition to approving the general method of calculation, the Court of Appeal also seemed to approve the current specific percentages to be applied as set out in *Re Jeffrey Estate*.

“...in Ontario at least, a practice has developed of awarding compensation on the basis of 2 ½ per cent percentages against the four categories of capital receipts, capital disbursements, revenue receipts and revenue disbursements, along with, in appropriate cases, a management fee of 2/5 of 1 per cent per annum on the gross value of the estate....”⁵

Since 1975, the percentages which have typically been utilized are⁶:

- a) 2.5% charged on capital receipts
- b) 2.5% charged on capital disbursements
- c) 2.5% charged on revenue receipts;
- d) 2.5% charged on revenue disbursements; and
- e) If the estate is not immediately distributable, an annual care and management fee of 2/5 of 1% on the gross value of the estate.

These percentages were codified for the first time in the 1995 Regulations to the *Substitute Decisions Act, 1992* (“the SDA”)⁷. However, the SDA applies only to attorneys and guardians, not to executors.

Prior to 1975, the percentages used were 2% on receipts and disbursements and ¼ of 1% on the gross value of the estate as an annual care and management fee.

⁴ *supra* at p. 179.

⁵ *supra* at p. 178

⁶ See for example, *Re Morton Estate* (1992), 46 E.T.R. 64 (O.C.G.D.)

⁷ O. Reg. 26/95, s. 1

Over the years there have been several attempts, notably by trust companies, to increase the guidelines. The most prominent reported case dealing with this issue was *Re Morton Estate*⁸. In that case, National Trust sought to increase the percentages from 2.5% to 3% on receipts and disbursements and from 2/5 of 1% to 3/5 of 1% for care and management. National Trust filed an extensive memorandum arguing that the 1975 level was out of date and that it is significantly out of line with the fees charged for similar services in other parts of the trust industry.

The Court was unmoved. D. Lane J. wrote:

"So there will be no misunderstanding, let me make it clear that if the trust industry is not prepared to subject its case for an increase in the guidelines to the test of cross-examination, it should cease to press the court in other estates for a change in the guidelines on the basis set out in the memorandum filed at this hearing. It should accept those guidelines and make a case, where appropriate, for a special extra fee for special extra services."

The decision in *Re Morton Estate* effectively froze the movement to increase the percentages until recently when two legislative amendments were enacted.

Firstly, on May 1, 2000, the Regulation to the *Substitute Decisions Act*, 1992 was amended increasing the percentages used in calculating compensation for attorneys and guardians⁹. The new percentages were set at 3% on receipts and disbursements and 3/5 of 1% as a care and management fee. As mentioned earlier, this amendment has no statutory effect on the calculation of executors' compensation. However, it does signify that the government felt that persons who provide executor-type services were entitled to a higher fee.

Secondly, at the same time, the Public Guardian and Trustee ("the PGT") established a higher fee for her office's services when acting as estate trustee.

⁸ *supra*

⁹ O. Reg. 159/00, s. 1

Pursuant to s. 8(2) of the *Public Guardian and Trustee Act*¹⁰, the PGT is authorized to establish its fees for services provided. Paragraph 8(a) of the *Schedule of Fees for the Public Guardian and Trustee* sets the fee for acting as Estate Trustee at 3% for receipts and disbursements and paragraph 10 sets the care and management fee at 3/5 of 1%.

The Public Guardian and Trustee's office has justified the increase by pointing out that as a government agency, its office provides security in case of mismanagement, and most of the estates which it administers are small.

The important question is what will courts do when other executors, relying on the amendments to the SDA and the PGT's new fees, seek equivalent increases in compensation. Unfortunately, so far no answer is available.

An executor claiming the increased amounts must be prepared to meet the arguments of the beneficiaries, which will likely be similar to those raised by the Court itself in *Re Morton Estate*. Beneficiaries will also attempt to draw distinctions between the PGT and private executors based on security, the types of estates administered by the PGT and other public policy issues. If beneficiaries can demonstrate significant differences between the PGT and private executors, the court may be reluctant to extend the increase in compensation to individual executors.

On the other hand, the statutory recognition of an increased tariff for certain fiduciaries in respect of the *Substitute Decisions Act, 1992* and the *Public Guardian and Trustee Act* will force courts to review the current percentage guidelines. Courts may feel that it is inappropriate to apply larger percentages for some fiduciaries and smaller percentages for others, without satisfactory justification for the distinction. If so, an increase for all executors is likely in the near future.

¹⁰ R.S.O. 1990 c. P.51 as amended

FORM OF ACCOUNTS

74.17 (1) Estate trustees shall keep accurate records of the assets and transactions in the estate and accounts filed with the court shall include,

- (a) on a first passing of accounts, a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;
- (b) on any subsequent passing of accounts, a statement of the assets on the date the accounts for the period were opened, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets, and a statement of the investments, if any, on the date the accounts for the period were opened;
- (c) an account of all money received, but excluding investment transactions recorded under clause (e);
- (d) an account of all money disbursed, including payments for trustee's compensation and payments made under a court order, but excluding investment transactions recorded under clause (e);
- (e) where the estate trustee has made investments, an account setting out,
 - (i) all money paid out to purchase investments,
 - (ii) all money received by way of repayments or realization on the investments in whole or in part, and
 - (iii) the balance of all the investments in the estate at the closing date of the accounts;
- (f) a statement of all the assets in the estate that are unrealized at the closing date of the accounts;
- (g) a statement of all money and investments in the estate at the closing date of the accounts;
- (h) a statement of all the liabilities of the estate, contingent or otherwise, at the closing date of the accounts;
- (i) a statement of the compensation claimed by the estate trustee and, where the statement of compensation includes a management fee based on the value of the assets of the estate, a statement setting out the method of determining the value of the assets; and
- (j) such other statements and information as the court requires.

(2) The accounts required by clauses (1)(c), (d) and (e) shall show the balance forward for each account.

(3) Where a will or trust deals separately with capital and income, the accounts shall be divided to show separately receipts and disbursements in respect of capital and income.

O. Reg. 484/94, s. 12

APPLICATION TO PASS ACCOUNTS*Material to be Filed*

74.18 (1) On the application of an estate trustee to pass accounts, the estate trustee shall file,

- (a) the estate accounts for the relevant period verified by affidavit of the estate trustee (Form 74.43);

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE) _____, THE ____ DAY
JUSTICE) OF _____, 2006

IN THE MATTER OF THE ESTATE OF _____,
deceased.

ORDER GIVING DIRECTIONS

THIS MOTION, made by the Applicant, was heard this day at the Court House,
_____, Ontario.

UPON READING the Consent of the parties, filed, and on hearing the submissions
made:

1. THIS COURT ORDERS that the within Application proceed by way of trial of an issue with respect to the Accounts of the Applicant, on the issues set out in the Notice of Objection filed by the Respondents.
2. THIS COURT ORDERS that the parties to these proceedings shall be the Applicant and the Respondents.

3. **THIS COURT ORDERS** that no person with a financial interest, other than those named in paragraph 2, is entitled to notice of any further proceeding, except for a copy of any final Judgment in respect of these proceedings.

4. **THIS COURT ORDERS** that the parties shall serve and file Affidavits of Documents and shall attend and submit to Examinations for Discovery in accordance with the *Rules of Civil Procedure*.

5. **THIS COURT ORDERS** that the parties shall attend for a Pre-Trial Conference after the conclusion of the Examinations for Discovery.

6. **THIS COURT ORDERS** that any vouchers in respect of entries listed in the accounts shall be available for inspection to the Respondents upon request by counsel for the Respondents. The costs of reproducing any copies of the vouchers shall be borne by the party so requesting.

- I. **THIS COURT ORDERS** that within 90 days of the date of this Order the parties attend for mediation before a mediator pursuant to Rule 75.1 of *the Rules of Civil Procedure* and makes the following directions:
 - (a) the issues to be mediated are those set out in the Notice of Objection to Accounts filed by counsel for Respondents, filed prior to the Mediation which apply to the period of the accounts filed.

 - (b) The Applicant and the Respondents are Designated Parties with the Applicant having carriage of the mediation and the Respondents responding to it,

- (c) The Notice of the Mediator giving the date, place and time of the mediation shall be served on the Designated Parties by an alternative to personal service pursuant to Rule 16.03 of the *Rules of Civil Procedure*,
- (d) The fees of the mediator shall be paid at first instance from the capital of the estate, subject to discretion of the Judge hearing the trial.
7. **THIS COURT ORDERS** that the parties are hereby granted leave to move for further directions as may appear advisable, if necessary.
8. **THIS COURT ORDERS** that the costs of this Motion shall be reserved for the judge hearing the Application.

(Signature of judge or registrar)

INVESTMENTS

Investments authorized by other Acts or regulations

26. If a provision of another Act or the regulations under another Act authorizes money or other property to be invested in property in which a trustee is authorized to invest and the provision came into force before section 16 of Schedule B of the *Red Tape Reduction Act, 1998*, the provision shall be deemed to authorize investment in the property in which a trustee could invest immediately before the coming into force of section 16 of Schedule B of the *Red Tape Reduction Act, 1998*. 1998, c. 18, Sched. B, s. 16 (1).

Investment standards

27. (1) In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments. 1998, c. 18, Sched. B, s. 16 (1).

Authorized investments

(2) A trustee may invest trust property in any form of property in which a prudent investor might invest. 1998, c. 18, Sched. B, s. 16 (1).

Mutual, pooled and segregated funds

(3) Any rule of law that prohibits a trustee from delegating powers or duties does not prevent the trustee from investing in mutual funds, pooled funds or segregated funds under variable insurance contracts, and sections 27.1 and 27.2 do not apply to the purchase of such funds. 2001, c. 9, Sched. B, s. 13 (2).

Common trust funds

(4) If trust property is held by co-trustees and one of the co-trustees is a trust corporation as defined in the *Loan and Trust Corporations Act*, any rule of law that prohibits a trustee from delegating powers or duties does not prevent the co-trustees from investing in a common trust fund, as defined in that Act, that is maintained by the trust corporation and sections 27.1 and 27.2 do not apply. 1998, c. 18, Sched. B, s. 16 (1); 2001, c. 9, Sched. B, s. 13 (3).

Criteria

(5) 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.
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. 1998, c. 18, Sched. B, s. 16 (1).

Diversification

(6) 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. 1998, c. 18, Sched. B, s. 16 (1).

Investment advice

(7) A trustee may obtain advice in relation to the investment of trust property. 1998, c. 18, Sched. B, s. 16 (1).

Reliance on advice

(8) It is not a breach of trust for a trustee to rely on advice obtained under subsection (7) if a prudent investor would rely on the advice under comparable circumstances. 1998, c. 18, Sched. B, s. 16 (1).

Terms of trust

(9) This section and section 27.1 do not authorize or require a trustee to act in a manner that is inconsistent with the terms of the trust. 2001, c. 9, Sched. B, s. 13 (4).

Same

(10) For the purposes of subsection (9), the constating documents of a corporation that is deemed to be a trustee under subsection 1 (2) of the *Charities Accounting Act* form part of the terms of the trust. 2001, c. 9, Sched. B, s. 13 (4).

Trustee may delegate functions to agent

27.1 (1) Subject to subsections (2) to (5), a trustee may authorize an agent to exercise any of the trustee's functions relating to investment of trust property to the same extent that a prudent investor, acting in accordance with ordinary investment practice, would authorize an agent to exercise any investment function. 2001, c. 9, Sched. B, s. 13 (5).

Investment plan or strategy

(2) A trustee may not authorize an agent to exercise functions on the trustee's behalf unless the trustee has prepared a written plan or strategy that,

- (a) complies with section 28; and
- (b) is intended to ensure that the functions will be exercised in the best interests of the beneficiaries of the trust. 2001, c. 9, Sched. B, s. 13 (5).

Agreement

(3) A trustee may not authorize an agent to exercise functions on the trustee's behalf unless a written agreement between the trustee and the agent is in effect and includes,

- (a) a requirement that the agent comply with the plan or strategy in place from time to time; and
- (b) a requirement that the agent report to the trustee at regular stated intervals. 2001, c. 9, Sched. B, s. 13 (5).

Trustee's duty

(4) A trustee is required to exercise prudence in selecting an agent, in establishing the

terms of the agent's authority and in monitoring the agent's performance to ensure compliance with those terms. 2001, c. 9, Sched. B, s. 13 (5).

Same

(5) For the purpose of subsection (4),

(a) prudence in selecting an agent includes compliance with any regulation made under section 30; and

(b) prudence in monitoring an agent's performance includes,

(i) reviewing the agent's reports,

(ii) regularly reviewing the agreement between the trustee and the agent and how it is being put into effect, including considering whether the plan or strategy of investment should be revised or replaced, replacing the plan or strategy if the trustee considers it appropriate to do so, and assessing whether the plan or strategy is being complied with,

(iii) considering whether directions should be provided to the agent or whether the agent's appointment should be revoked, and

(iv) providing directions to the agent or revoking the appointment if the trustee considers it appropriate to do so. 2001, c. 9, Sched. B, s. 13 (5).

Duty of agent

27.2 (1) An agent who is authorized to exercise a trustee's functions relating to investment of trust property has a duty to do so,

(a) with the standard of care expected of a person carrying on the business of investing the money of others;

(b) in accordance with the agreement between the trustee and the agent; and

(c) in accordance with the plan or strategy of investment. 2001, c. 9, Sched. B, s. 13 (5).

No further delegation

(2) An agent who is authorized to exercise a trustee's functions relating to investment of trust property shall not delegate that authority to another person. 2001, c. 9, Sched. B, s. 13 (5).

Proceeding against agent

(3) If an agent is authorized to exercise a trustee's functions relating to investment of trust property and the trust suffers a loss because of the agent's breach of the duty owed under subsection (1) or (2), a proceeding against the agent may be commenced by,

(a) the trustee; or

(b) a beneficiary, if the trustee does not commence a proceeding within a reasonable time after acquiring knowledge of the breach. 2001, c. 9, Sched. B, s. 13 (5).

Protection from liability

28. A trustee is not liable for a loss to the trust arising from the investment of trust

property if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances. 1998, c. 18, Sched. B, s. 16 (1).

Assessment of damages

29. If a trustee is liable for a loss to the trust arising from the investment of trust property, a court assessing the damages payable by the trustee may take into account the overall performance of the investments. 1998, c. 18, Sched. B, s. 16 (1).

Regulations, agents

30. The Attorney General may make regulations governing or restricting the classes of persons or the qualifications of persons who are eligible to be agents under section 27.1 and establishing conditions for eligibility. 2001, c. 9, Sched. B, s. 13 (6).

Application, ss. 27-30

31. Sections 27 to 30 apply to a trust whether it is created before or after the date section 13 of Schedule B to the *Government Efficiency Act, 2001* comes into force. 2001, c. 9, Sched. B, s. 13 (6).

32. Repealed: 1998, c. 18, Sched. B, s. 16 (1).

33. Repealed: 1998, c. 18, Sched. B, s. 16 (1).

34. Repealed: 1998, c. 18, Sched. B, s. 16 (1).

Powers, etc. under Act and trust instrument

67. The powers, rights and immunities conferred by this Act are in addition to those conferred by the instrument creating the trust, and have effect subject to the terms thereof. R.S.O. 1990, c. T.23, s. 67.

Express terms of trust instrument to prevail

68. Nothing in this Act authorizes a trustee to do anything that the trustee is in express terms forbidden to do, or to omit to do anything that the trustee is in express terms directed to do by the instrument creating the trust. R.S.O. 1990, c. T.23, s. 68.

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