Toronto Law Journal

Who's On First, What's On Second

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"There are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know."

- Donald Rumsfeld

The sharing economy caught lawmakers completely off guard. As technology firms such as Uber and Airbnb progressed through various rounds of capital-raising, crossed borders and gained widespread adoption, the people making the rules governing the services they offered stood flat-footed. Even after the concept of ordering a ride or a room through an app became the new normal, politicians and bureaucrats were slow to respond.

From their vantage point, the sharing economy is case-in-point an "unknown unknown"—a concept introduced to the public in 2002 into popular culture by Donald Rumsfeld, the United States Secretary of Defence at the time. The expression, which garnered considerable commentary the moment it entered the news cycle, is actually common in some management circles and refers to things so far removed from reality that they show up on nobody's radar screen. For whatever reason, the notion that the hospitality and transportation industries could one day be liberalized from the control of government seems to have crossed nobody's mind.

Before we go any further, it is worth noting that the term "sharing economy" itself is a misnomer. Uber, for example, is not a co-operative and its drivers are not sharing rides. They are arguably independent contractors, providing a service and receiving a fee. With this in mind, there is little difference between an Uber driver and an independent house painter or handyman—other than the fact that Uber has upended a highly inefficient and anti-competitive taxi industry.

As far as liability and insurance are concerned, the matter up until now has been that most Uber drivers have not been insured as commercial vehicles. The taxi industry rightly argues that by being mandated to purchase commercial insurance, they are at a competitive disadvantage. Uber's own $5 million policy in March 2015 was disclosed to be a commercial general liability policy with an endorsement for standard non-owned auto coverage, as opposed to a policy specifically to protect drivers and their passengers.

Toronto Uber driver Tawfiqul Alam learned this following an accident in which he was not at fault, but that caused serious damage to his vehicle and injuries to himself and his passenger. After submitting his claim to his insurer, Mr. Alam was denied coverage because he was not

insured to use his personal vehicle to drive passengers in exchange for money. Mr. Alam has hired a lawyer to pursue Uber for compensation.

In the future, these situations should be less frequent, as the insurance industry has begun to respond to drivers such as Mr. Alam. British-based Aviva's Canadian division is now offering policies for part-time drivers in Ontario. "With ride-sharing on the rise, consumers have new options available to them, however there is a gap in insurance coverage which potentially leaves them without appropriate protection and benefits. When consumer needs change, we must evolve our insurance solutions to respond," said Aviva's President and CEO Greg Somerville in January. It stands to reason that Aviva's competitors will follow suit.

An additional set of issues—the employment status of drivers and the collection and remittance of taxes, for example—pale in comparison to the dilemma in which Uber has placed municipal politicians, licensing authorities and law enforcement agencies. The taxi industry and its supporters argue that Uber is acting outside the law—and it is, but no more so than an individual or entity that contravenes another municipal bylaw. Even if a heavy-handed response from law enforcement were warranted, with 15,000 drivers in Toronto alone, it would be practically impossible to ticket Uber out of existence.

The challenge facing municipalities, should they seek other legal remedies to prohibit Uber from operating, is that they would be acting against the public interest. Uber is wildly popular and has made travelling faster, more convenient, less expensive and arguably safer. Courts would find no more rationale in compromising the public good only to benefit the interests of the taxi industry than they would to mandate the horse and buggy back into existence to protect the interests of manure shovellers.

Further, from a public relations point-of-view, the taxi industry has lost. Poor vehicle conditions and discourteous drivers have hardly built up any good will among the public. And while drivers protest—as though theirs are the only jobs entitled to be protected from obsolescence—Uber drivers are delivering hot lunches and visiting offices with kittens to benefit the local humane society.

The irony is that the disruption has only begun. Uber drivers themselves will become obsolete in less than a generation with the introduction of self-driving cars. For insurers and their litigators, this future is also concerning. Surely, automated vehicles will present interesting legal questions, moral dilemmas and opportunities for the development of new insurance products, but the impacts will also be significant. Risk will drop dramatically, along with premiums. So too will the number of accidents and corresponding volume of work for adjusters and lawyers.

These individuals may one day join the parking lot pavers, traffic cops and the blacksmiths in finding their jobs disrupted by progress. Hopefully they will have taken a lesson from the taxi drivers and have seen it coming.

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Ontario's Proposed New Cap and Trade Regime

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On February 24, 2016 the Ontario government unveiled Bill 172, the *Climate Change Mitigation and Low-carbon Economy Act, 2016*[ii] (the Act). The Act, if passed, will establish the foundation for Ontario's cap and trade regime. The Ontario Ministry of Environment and Climate Change (MOECC) has also released two draft regulations: the *Draft Cap and Trade Regulation* [iii], which outlines the mechanics of the proposed regime, and the *Revised Guideline for Greenhouse Gas Emissions Reporting*[iv], which would replace the current *Greenhouse Gas Emissions Reporting Regulation* (O. Reg. 452/09).

Background

In February 2015 the MOECC released a discussion paper that identified carbon pricing as a critical action necessary to reduce emissions of greenhouse gases (GHG) in Ontario. In April 2015 the Ontario government announced it would be implementing a GHG cap and trade program. While limited details were released at this time, the Province made clear that the program would be implemented through the Western Climate Initiative (WCI), the largest carbon market in North America, which includes Quebec and California.

On November 16, 2015 the MOECC unveiled *Cap and Trade Program Design Options* [v] (the Discussion Paper) which defined the mechanics of the cap and trade regime in more detail, identified proposed design options, and included questions that stakeholders were encouraged to comment on. Stakeholder feedback was reviewed and incorporated into the Act.

Overview of the Act

The key elements of the Act are that it:

1. Establishes targets for the reduction of GHG emission in Ontario;
2. Requires the Ontario government to prepare a climate change action plan to achieve these targets;
3. Requires certain persons to quantify GHG emissions associated with their activities, report these emissions, and have these reports verified;
4. Establishes a framework for GHG cap and trade in Ontario. More specifically, the Act:

a. establishes three categories of participants: mandatory participants, voluntary participants, and market participants (i.e. entities with no reporting or verification requirements, but who wish to purchase and sell emissions credits);
b. authorizes the Minister to create various classes of emission allowances and distribute such allowances to registered participants either for a fee or free of charge. The Regulations establish who may receive emission allowances and the method for allocating free allowances;
c. authorizes the Minister to create and issue various classes of offset credits to registered participants;
d. authorizes the creation of regulations to establish market rules and auction protocol, including purchase limits and holding limits;
e. authorizes the Minister to harmonize the cap and trade system with other jurisdictions, such as Quebec and California;
f. establishes the Greenhouse Gas Reduction Account, which will receive all proceeds generated by the cap and trade regime. Payments may be made from the Account for initiatives that are reasonably likely to reduce or support the reduction of GHG emissions; and
g. establishes enforcement mechanisms such as fines for regulated participants whose emissions exceed their allowances or credits and administrative monetary penalties.

Key Elements of the Cap and Trade Regime

A. Timing

Mandatory and voluntary participants will be responsible for their emissions starting on January 1, 2017. The first auction of emission allowances will be held in March, 2017; this would be a stand-alone Ontario auction and would not be linked with Quebec and California. Once alignment is complete, auctions with Quebec and California will be held every quarter. The first "true up" period would not be until 2021.

B. Setting the Cap

In order to facilitate a smooth transition into the cap and trade system, the Province proposes to set the 2017 caps at its best estimate of what 2017 emissions will be. More specifically, the Province proposes to set the cap at 142,332,000 allowances which is equal to 142,332,000 tonnes of CO2 "equivalent". This amount takes into consideration expected growth in the economy as well as new and expanding facilities. This cap will decline each year to support a reduction of Ontario's GHG emissions to the following levels:

a. 15% below 1990 levels by the end of 2020;

b. 37% below 1990 levels by the end of 2030; and

c. 80% below 1990 levels by the end of 2050.

The Province proposes that all industrial and institutional sectors have an assistance factor of 100% in the first compliance period (i.e. up to 2020). That is, all industrial and institutional mandatory participants will receive 100% of their required GHG emission allowances free of charge until 2020. This assistance factor will be reassessed prior to the beginning of the second compliance period (2021-2023).

C. Scope

The following discussion, organized by sector, explains which facilities and persons will be mandatory participants under the cap and trade regime.

1. **Electricity, including imported electricity for consumption in Ontario**
   For domestic electricity generation, mandatory participants will be the fuel distributors providing fossil fuel to such electricity generation facilities. The exception to this general rule is where generation facilities receive fuel directly from inter-provincial or international natural gas pipelines, i.e. not via a gas distribution utility. In this case, the generation facilities themselves will be mandatory participants. For electricity imports, the mandatory participant will be the "first jurisdictional deliverer" (i.e. the entity who first imports the electricity into the province).

2. **Industrial and large commercial operators (such as manufacturing, base metal processing, steel, pulp and paper, and food processing)**
   Mandatory participants would be facilities with annual GHG emissions equal or greater than 25,000 tonnes. Industrial and large commercial operators include facilities that produce copper, nickel, iron, steel, hydrogen, lead, pulp and paper as well as other facilities listed in Table 2 of O. Reg. 452/09.

3. **Institutions**
   Similar to the industrial sector, mandatory participants will be facilities with annual GHG emissions equal or greater than 25,000 tonnes. It is worth noting that when considering what constitutes a facility (either an institutional facility or industrial/commercial facility), the Province has indicated it will follow the guidelines in the applicable GHG emissions reporting regulation. O. Reg. 452/09 defines a facility as all buildings, equipment, structures and stationary items that are owned or operated by the same person and are located on either a single site or adjacent sites that function as a single site. A facility also includes sites that are not adjacent if they are connected by natural gas pipelines.

4. **Transportation fuel, including propane and fuel oil**
   The mandatory participants in this sector will be distributors who (i) distribute to an Ontario consumer, (ii) deal with volumes of 200 litres or more, and (iii) first place the transportation fuel into the market.

5. **Natural gas distribution**
   Mandatory participants will be those that, in aggregate, are associated with annual GHG emissions of 25,000 tonnes or greater, and operate the point the gas is transferred from pipeline into the distribution network for local customers.

   In addition to the mandatory participants identified above, the Act allows certain persons to opt in the regime as "voluntary participants." Persons with annual GHG emissions of 10,000 – 25,000 tonnes, who are required to submit emissions reports but are not required to have them verified, can choose to opt in as voluntary participants. A person who is not an employee of a mandatory or voluntary participant may apply to act as a market participant. Note that the cap and trade system as currently proposed does not include regulating GHG's at the individual or retail consumer level (e.g. home or vehicle owners).

D. Market Design

The Act allows the Ontario government to develop regulations that clarify the market design features of the cap and trade regime. Market design features will largely be based on those developed by the WCI. Consistent with WCI market design, the Ontario regime will allow market participants to participate in auctions and purchase credits. Key components of market design include registration requirements, auction rules, trading rules, settlement or reconciliation rules, and strategic reserve sales. Auctions will be conducted by sealed bid in a single round with lot sizes of 1,000 allowances with a uniform minimum price. With respect to market rules, there will be a purchase limit and a holding limit. The purchase limit will prevent mandatory and voluntary participants from purchasing more than 25% of allowances sold at an auction; market participants will be limited to 4% of allowances available at auction. The holding limit refers to the total amount of emissions allowances and credits a participant may own. The limit will be set annually and will depend on the number of Ontario emission allowances created for the year. It is worth noting that section 31(6) of the Act prohibits a person from disclosing whether or not they are participating in an auction, except to the extent they may be exempt from this prohibition by regulation.

E. Market Stability

Price stability will be accomplished by two main mechanisms: (i) the auction reserve price and (ii) a strategic reserve. The auction reserve price sets a minimum price level for emission permits sold at auction. In 2016, Quebec and California set this price at $12.82 CAD; Ontario plans to align its auction reserve price with that of Quebec and California for 2017. The strategic reserve sets aside 5% of all allowances from 2017 to 2020 and divides these allowances into three price tiers. This strategic reserve will only be available to Ontario emitters, and strategic reserve allowances can only be used for compliance. Ontario plans to align its strategic reserve price tiers with that of Quebec and California for 2017. Quebec and California set their price tiers at $40, $45, and $50 per allowance in 2013, escalating annually at 5% plus inflation and converted to Canadian currency.

F. Market Leakage

The Province has recognized "carbon leakage" as a risk of implementing the cap and trade regime. The Discussion Paper explains that carbon leakage "occurs when production shifts to a jurisdiction with a less stringent carbon pricing policy." In order to address this risk, the Act authorizes payment from the Greenhouse Gas Reduction Account to assist sectors at risk for market leakage. Additionally, the Act gives the Director the discretion to distribute emission allowances free of charge, which can be used to assist emissions intensive and trade exposed entities. Emissions from electricity generation, however, will not be eligible to receive allowances free of charge. The Province has indicated that distribution of free allowances will decline over time, and such distribution would be reviewed at the end of the first compliance period as part of the program review.

G. Offset Credits

The Province proposes to develop an Offset Credit Registry and issue credits for emissions reductions generated by non-regulated entities. According to the Discussion Paper, mandatory and voluntary participants would be able to use offset credits to satisfy up to 8% of the total compliance obligation. The government has not yet developed an offset protocol, meaning that what constitutes an "offset credit" has not yet been determined. Current proposed offset project types include the capture and destruction of mine methane, landfill gas, and ozone depleting substances.

H. True Up and Penalties

At the end of a compliance period all mandatory and voluntary participants must surrender a number of credits equal to their emissions. Participants have 11 months to complete this true up (e.g. for the compliance period ended December 31, 2020 participants would have to true up by November 1, 2021). Participants with excess emissions will be subject to a three-to-one compliance penalty. That is, for each allowance an entity is short at true up they must surrender (i) the allowance originally owed, and (ii) an additional three allowances. An emitter's holding account can be suspended if it fails to surrender the required amount of allowances and/or offset credits and the emitter may be subject to fines.

Much of the Act is dedicated to establishing investigation, enforcement and administration mechanisms. For example, section 38 gives a provincial officer the ability to inspect certain documents. Section 47 states that every person who contravenes or fails to comply with the Act is guilty of an offence. Section 47(4) specifically states that directors and officers of a corporation who directed or acquiesced an offence under the Act may be held personally liable for such an offence. Further, section 48 of the Act establishes fines that are applicable to a range of offences. For instance, on a first conviction for failing to submit emission allowances and credits a corporation is liable for at least $25,000 for each day the offence is committed, up to a total of $6 million. For the same offence, an individual is liable for at least $5,000 for each day the offence is committed, up to a total of $4 million and imprisonment for up to five years. Finally, section 54 allows the Director to make an order

requiring a person to pay an administrative monetary penalty. These penalties can be used to ensure compliance with the Act or to prevent a person or entity from deriving an economic benefit as a result of contravening the Act or its regulations. Unlike a fine under the Act, an administrative monetary penalty cannot be levied for a failure to submit emission allowances and credits. The cap for administrative monetary penalties is $1 million.

Discussion

The Ontario government anticipates that 82% of Ontario's GHG emissions will be captured by its cap and trade system, with the remaining 18% coming from small emitters not covered by the regime.[vi] The Province also expects the cap and trade regime to generate $1.9 billion annually, with all of these proceeds being reinvested in initiatives that will reduce Ontario's GHG emissions and support the transition to a low carbon economy.[vii] Further, the Ontario government has noted that after California introduced its cap and trade regime, the state's economy and total number of jobs grew at a rate that outpaced the rest of the U.S. economy.[viii] Whether Ontario will realize such benefits and whether its proposed GHG cap and trade system will have sufficient liquidity and pricing to stimulate excess GHG reductions by those with lower marginal costs of reduction, or rather operate in substance as a tax, remains to be seen.

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i The authors are partners of Osler, Hoskin & Harcourt LLP, save Ms. Hall-McGuire, who is an associate.

ii http://www.ontla.on.ca/bills/bills-files/41_Parliament/Session1/b172.pdf

iii http://www.downloads.ene.gov.on.ca/envision/env_reg/er/documents/2016/012-6837_DraftReg.pdf

iv http://www.downloads.ene.gov.on.ca/envision/env_reg/er/documents/2016/012-6837_Guideline.pdf

v http://www.downloads.ene.gov.on.ca/envision/env_reg/er/documents/2015/012-5666_Options.pdf

vi MOECC, "Ontario Posts Cap and Trade Regulation - Province Reducing Greenhouse Gas Emissions, Creating Jobs" Government of Ontario Newsroom (25 February 2016) online: https://news.ontario.ca/ene/en/2016/02/ontario-posts-cap-and-trade-regulation.html.

vii *Ibid.*

viii *Ibid.*

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What Determines the Contract of Carriage?

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The rights of parties in shipping arrangements are defined through what is known as contracts of carriage. Such contracts encompass the terms and conditions of the shipment between those involved in the shipment of goods, for instance. Frequently in the carriage of goods context, the tendency is to simply refer to the bill of lading as governing all terms of carriage. Indeed, provincial regulations (in most provinces) deem to incorporate certain uniform terms and conditions into bills of lading, and thus into contracts of carriage. In this manner the bill of lading does frequently represent the best evidence of the parties' intentions and their contract of carriage.

However, this article is intended to highlight the importance of considering the complete full factual matrix of the carriage arrangement at issue. Reviewing two recent Ontario cases together demonstrates that determining what truly constitutes the contract of carriage in a commercial cargo shipment may not always be as straightforward as reviewing the face of the bill of lading. Rather than simply turn to and rely upon the wording of a singular document, such as a bill of lading, parties are better served by looking at all the circumstances of the arrangement, and only then are they in a position to ascertain the terms of carriage, and from that, the rights and obligations of the affected parties.

Recent cases on contracts of carriage

The 2015 case of *A&A Trading v. DIL's Trucking Inc.* 2015 ONSC 1887 ("*A&A Trading*"), involved a plaintiff's goods that were stolen while in transit. The plaintiff sought to recover the value and its costs. Before shipping the goods, the plaintiff had told the defendant that the goods had a value of between $250,000 and $263,000 and asked whether the defendant had sufficient insurance. The defendant confirmed that there was sufficient insurance and the shipment proceeded.

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Each party had its own standard bill of lading but neither contained a space to declare value. The plaintiff did not declare a value on the bill of lading but attached a copy of an invoice showing the value of goods to be $263,520 and a packing slip. The defendant referenced these documents on its bill of lading, while both parties signed that bill.

The central issue was whether the defendant's liability could be capped at $4.41 per kilogram of lost cargo, pursuant to *Carriage of Goods*, O. Reg. 643.05 under *the Highway Traffic Act*, R.S.O 1990, c. H.8. Relevant observations by the Court included that the regulation does not define a contract or carriage, nor does it equate a contract of carriage to a bill of lading.

The Court ruled in favour of the plaintiff, finding that the defendant was liable for the full value of the goods stolen because the commercial invoice (which did state a value) was referenced on the face of the bill of lading. The Court also referenced the common practice between the parties and held that it was "… clear the defendant was aware of the value of the plaintiff's consignment." The Court therefore concluded the commercial invoice formed part of the contract of carriage. The written reference to the invoice on the face of the bill of lading (and arguably together with the practice of the parties) gave a basis for the Court to hold there was an intent to provide the carrier with notice of the value of goods, which was sufficient declaration of value to prevent the application of the $4.41 per kilogram limitation of liability.

Thus, the contract of carriage was not wholly reflected simply by reference to the language upon the bill of lading, but rather the Court also considered evidence of the defendant's representations concerning insurance, and accepted a valuation through a document (i.e. the invoice) incorporated by reference into the bill of lading.

Contrasting *A&A Trading* with *National Refrigeration & Air Conditioning Canada Corp. v. Celadon Group Inc.* 2016 ONCA 339 ("*National v. Celadon*") demonstrates the importance of resorting to underlying factual circumstances to appreciate the standpoint of the respective actors and to ascertain the actual contract of carriage between them. In litigating this dispute, both National and Celadon appear to have tried resorting to extraneous facts to extend the contract of carriage and thus improve their respective positions, however both were unsuccessful. The Ontario Court of Appeal issued its ruling in *National v. Celadon* on May 5, 2016.

After National had two shipments of copper tubing stolen while on route from Mexico to Ontario, National sued Celadon for the loss of the shipments. Celadon then claimed (among other things) that its website's terms and conditions excluded it from any liability for loss or damage occurring in Mexico. In making this claim, Celadon attempted to extend the contracts of carriage for these shipments to encapsulate exclusionary language contained within terms and conditions posted on its website.

The trial judge found that Celadon could not rely upon exclusions of liability posted within its website's terms and conditions. The terms and conditions were not sufficiently brought to National's attention, were possibly ambiguous, and ultimately, the Court concluded the terms and conditions did not form part of the contract of carriage. Therefore, on these particular facts, Celadon could not extend the contract of carriage to include its website's terms and conditions. The Ontario Court of Appeal upheld this determination, citing deference to the Trial Court on what the Court of Appeal deemed to be a question of mixed fact and law.

Conversely, before the Ontario Court of Appeal, National also could not extend the contract of carriage in the manner it wanted by its reliance upon extraneous material. National had asserted that a value on a commercial invoice constituted a declared value. In so arguing, National hoped to avoid the limitation of liability pursuant to section 9 of Schedule 1 of Ontario Regulation 643/05, which provides that a carrier's liability is limited to $4.41 per kilogram, unless a value of goods is declared on the face of the contract of carriage. The Trial Court accepted National's position; however the finding did not stand and was overturned on appeal.

Unlike in *A&A Trading*, these bills of lading did contain spaces for declared values, and did not contain reference to commercial invoices. The Ontario Court of Appeal therefore found that the Trial Court erred in law when it found that the existence of a commercial invoice, and its provision by the Mexican consignor to National and then on to the carrier, satisfied the regulation's requirement for declaring a value on the face of the contract of carriage. Instead, the Ontario Court of Appeal ruled that the limitation of liability of $4.41 per kilogram could apply, and noted the invoice from the consignor "… had nothing to do with the contract of carriage and providing a copy … to the carrier was not declaring the value …". Simply handing the document to a carrier was insufficient to "declare" a value.

Commentary on the distinction between the two cases

The factual distinctions between the two cases provide insights concerning the formation of a contract of carriage, and suggests the following useful principles when considering the scope of liability in a carriage arrangement:

1. A commercial invoice referenced on the face of the bill of lading may constitute proof of declared value – the commercial invoice issued by the consignor in *National v. Celadon* was provided to the carrier but was not referred to on the face of the bill of lading, while in *A&A Trading*, the invoice was provided to the carrier and, perhaps more importantly, was incorporated by reference into the bill of lading, and the Court concluded it formed part of the contract of carriage;

2. The closer the bill of lading conforms to the regulatory scheme, the greater reliance parties may likely place on it as constituting the entirety of the contract of carriage – in *A&A Trading* the bills of lading did not conform to Regulation 643/05, and had no space for stating a declared value. The Court was willing to consider a declared value incorporated by reference to the commercial invoice. In *National v. Celadon* the bill of lading contained an empty space for a declared value, which could itself have precluded any willingness of the Court to consider an incorporation of declared value by reference to a commercial invoice.

3. Evidence of parties' representations and pre-contractual arrangements may be tendered, but may not necessarily be determinative or even impactful - in *A&A Trading* the Court heard evidence of the pre-contractual conversations concerning valuation and sufficiency of insurance, while in *National v. Celadon* the parties prior history and dealings were again presented and considered, but ultimately formed an insufficient basis to allow Celadon to rely upon its website terms and conditions.

These cases once again confirm that the bill of lading, while not determinative of a contract of carriage, often presents as the best evidence of the arrangement. While the bill of lading itself may not contain all required terms and conditions, the possible inclusion of terms and conditions by incorporation by reference (such as through the invoice in *A&A Trading*), or conversely the omission of terms of conditions (such as the absence of the Celadon website's terms), each can have a bearing on the perceived rights of the various actors.

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The New Rules Of Practice For Estates: An Overview

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I. AN OVERVIEW

On July 9, 2015, several amendments to the *Rules of Civil Procedure*[1] (the **"Rules"**) were filed with the registrar under the *Courts of Justice Act*.[2] These amendments include various changes to the practice of estates under Rules 74 and 75, which came into force as of January 1, 2016. These include changes respecting passing of accounts; changes affecting certificates, including Court Status Certificates, Certificates of Grant, and Exemplification Certificates; new rules regarding proof of death requirements; and court-ordered mediation changes. In this paper, I will provide an overview of each of these changes, followed by a brief discussion on how these changes may affect our practice as estate law practitioners going forward.[3]

II. PASSING OF ACCOUNTS

Among the recent amendments, the changes to the procedure by which an Application to Pass Accounts is to proceed before the court is perhaps the one which will have the greatest impact on daily practice. For instance, the changes will affect service and filing deadlines for certain types of documentation, as well as who must be served in cases where there is an individual under disability. In other cases, there are new mechanisms available to allow an interested person to stay apprised of a Passing of Accounts that did not previously exist. More specifically, some of the changes include the following:

i. **74.18(3.2)** – This Rule now clarifies that a personal representative, such as an attorney or guardian of property, is to be served with the Application Record and Draft Judgment on behalf of a person under disability who has a vested or contingent interest in the estate.

This Rule provides clarification which will ensure consistency in practice habits and avoid inadvertent errors in procedure that may cause unnecessary delays with respect to the process involved in a Passing of Accounts Application.

ii. **74.18(7)** - The Notice of Objection to Accounts must now be served and filed at least 35 days prior to the hearing date specified in the Notice of Application. This is in contrast to the previous rule, which required it to be served and filed 30 days prior to the hearing date.

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[1] *Rules of Civil Procedure*, RRO 1990, Reg. 194.
[2] *Courts of Justice Act*, RSO 1990, c. C. 43.
[3] See Appendix for full reading of the new Rules described herein.

It is worth nothing that the changes to the deadline associated with the Notice of Objection to Accounts means that there is now five less days to prepare and file the Notice of Objection to Accounts. As the parameters for serving a beneficiary with the Application to Pass Accounts remain unchanged by the updated rules (being 60 days prior to the hearing for those served in Ontario, and 75 days prior to the hearing for those served outside of Ontario), the effect of this appears to be that there is now less time to prepare any Notice of Objection to Accounts upon being served with the Application to Pass Accounts.

iii. 74.18(8) – If served with a Notice of Application to Pass Accounts and the person does not object to the accounts but wishes to receive further information, they may now elect to receive notice of any further steps by delivering a Request for Further Notice in Passing of Accounts, at least 35 days before the hearing date.

This can be done by completing Form 74.45.1. The Request entitles the person who files it to receive notice of any further steps, to receive copies of any further documents, and to file materials relating to costs. In the event of a hearing, it also entitles the person filing it to be heard, to examine witnesses, and to cross-examine on affidavits, but only with respect to a request for increased costs.

Previously, an individual who wanted to preserve their rights to receive information in the proceedings had no formal mechanism by which they could do so. Some would even unnecessarily file a Notice of Objection to Accounts simply to remain in the loop, despite the fact that they may have had no actual objections. This Rule will facilitate and streamline the process by avoiding unnecessary objections, while ensuring that interested parties can continue to preserve their rights in a more conducive format.

iv. 74.18(8.5) – If no Notices of Objection are filed, or if they are withdrawn at least 15 days prior to the hearing date, there is no requirement to have a hearing. Additionally, provided that the Applicant files the Judgment Record materials at least 5 days prior to the scheduled hearing, the court may grant a judgment on the passing without a hearing, including for a passing of accounts that involves a Request for Increased Costs.

Avoiding the requirement of a hearing on an uncontested Passing of Accounts will be a welcome relief for many. This is primarily because this will help alleviate rising costs associated with a Passing of Accounts. Moreover, this measure will contribute to reducing the use of already limited court resources.

v. 74.18(9) - A Judgment Record on an unopposed passing of accounts must now be filed at least 5 days prior to the hearing date specified in the

Notice of Application. This is in contrast to the previous rule, which required it to be filed at least 10 days prior to the hearing date.

vi. 74.18(11.1) - A Request for Increased Costs must now be served and filed at least 15 days prior to the hearing date specified in the Notice of Application (and not between the period commencing 10 days after the Notice of Application is served and ending 20 days prior to the hearing date as under the previous rules).

vii. 74.18(11.5)(b) - A Reply to Notice of Objection to Accounts (new Form 74.49.4) must be delivered 10 days before the hearing where a Notice of Objection to Accounts is delivered.

viii. 74.18(11.7) – If the Application proceeds to a hearing, the Applicant must file with the court a record containing the following documents:

- the Application to Pass Accounts;
- any Notices of Objection to Accounts;
- any responses to the reply to Notices of Objection to Accounts;
- any Notices of Withdrawal of Objection;
- any notices of Non-Participation in passing of accounts of the Public Guardian and Trustee and/or the Children's Lawyer;
- any requests for further notice in passing of accounts;
- any requests for costs;
- any requests for increased costs, costs outlines, and responses to requests for increased costs; and
- a draft order for directions of the judgment sought.

xi. 74.18(13.1) – On hearing the Application, the court may order that the Application or any of the issues proceed to trial and/or provide directions.

III. CERTIFICATES

Another rule that has been introduced is Rule 74.14.1. This Rule allows a person to make a written request to the registrar for authentication of a Certificate of Appointment that has been issued. The registrar will issue a "Certificate of Grant" for use within Canada and an "Exemplification Certificate" signed by a judge if the authentication is intended to be used outside of Canada.

Furthermore, Rule 74.14.2 has been implemented to address previous challenges that were associated with confirming the authority of an estate trustee. These might arise in situations where there has been a change due to the death of an estate trustee named in the will or as a result of the removal of an estate trustee by the court. It can even apply when there has been no change of estate trustees at all but a confirmation of authority is sought nonetheless.

This Rule allows an interested person to make a written request to the registrar to obtain a Confirmation Status of Estate Trustee or Court Status Certificate. Upon filing the necessary documents, a Court Status Certificate can be obtained, which confirms the authority of the estate trustees. This can be useful when there is any doubt as to who should be acting as estate trustee and will hopefully avoid situations where an individual is unknowingly acting improperly on behalf of the estate and potentially incurring personal liability.

IV. PROOF OF DEATH

The new amendments also affect the Application for Appointment of an Estate Trustee. According to Rule 74.04(1)(a.1), it is now mandatory to file a proof of death as part of this Application. The Rules provide us with a new definition of proof of death to assist in determining what types of documentation will be acceptable.

Pursuant to Rule 74.01, proof of death means, "documentary evidence of a person's death, including a death certificate issued by the Registrar General, a certificate in respect of the death issued by a funeral director, or an order made under the *Declarations of Death Act, 2002* declaring that the person has died."

The new aspect of this definition is that it now includes a court order declaring a person to be deceased under the *Declarations of Death Act* as an acceptable form of proof of death.

V. COURT-ORDERED MEDIATION

Another one of the major changes applies to the rules for mediation in estates matters. Mediation in estates matters is mandatory in Toronto, Ottawa, and Essex County, unless waived by a judge, under the terms of Rule 75.1. However, in other parts of the province, mediation is not required. Despite it not being mandatory outside of the above-mentioned regions, mediation can be an exceptionally useful tool which is often successful in resolving estate disputes. When successful, it can help avoid unnecessary litigation costs and the wasting of limited court resources.

Under the new Rule 75.2, the court now has the power to direct the parties to attend mediation in an Order Giving Directions under Rule 75.06 or on a contested Application to Pass Accounts under Rule 74.18. This is the case, even where the mediation is not mandatory under Rule 75.1.

Court-ordered mediation may prove to be highly beneficial to an estates practice. As mentioned, mediation is often successful at creating an environment that requires the parties to seriously re-consider their positions and whether any perceived benefits in pursuing the litigation outweigh the risks. By involving a neutral third party, it is not uncommon to see a resolution arrived at in cases where the parties were previously firmly entrenched in their positions. Accordingly, by providing the court with the discretion to order this process in cases where it feels that it may be suitable, it is likely that many disputes will be settled much earlier on in the process, thereby avoiding unnecessary costs.

VI. CONCLUSION

These amendments to the Rules have only been in effect for a short while and so their practical effect still remains to be seen. As many of the changes deal with deadlines for service and filing, it is important to be mindful of these changes going forward. With respect to the changes affecting court-ordered mediation and the obtaining of certificates, these are now options that estate practitioners should be aware of and that their clients should be advised of, whenever applicable.