



LAFRENIÈRE SANNA  
— ESTATE LAW —  
A B O U T I Q U E F I R M

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## Foreign Executors, Trustees, and Attorneys

In this brochure, we review the pros and cons of naming executors, trustees, or attorneys for property who are resident in, or citizens of, countries other than Canada.

### Executors and Trustees

If a person acting as an executor (also referred to as an 'Estate Trustee') or a trustee of a Canadian estate or trust is a non-resident of Canada for tax purposes, any trust which is administered by the non-resident will likely be a non-resident trust and may be taxed differently. The estate or trust may also be subject to the tax laws of the jurisdiction where the trustee is resident. An estate is a trust for tax purposes.

Although the Canadian tax system is based on residency, the tax systems of some jurisdictions are based on citizenship not residency. For example, a person who is a US citizen but is resident in Canada is likely subject to both Canadian and US tax laws. If that person is a trustee of a Canadian estate or trust, US tax implications must be considered.

In addition to the concerns about income tax, when a non-resident or foreign executor of an Ontario estate is named, in most cases the Court will require an executor's bond issued by an insurance company before granting a 'Certificate of Appointment of Estate Trustee' commonly referred to as probate. The costs of obtaining such a bond are the estate's including the bond premium. Some insurance companies require pre-payment of three years' worth of bond premiums. In our experience, the premiums are generally non-refundable and can cost in the thousands of dollars.

Before issuing a bond, the executor or trustee will need to complete a detailed application to provide personal and financial information so that the insurance company can assess its risk in issuing

the bond. Many individuals are reluctant to provide this information; however, even if an executor or trustee is willing to provide 'reveal all', it can be difficult to find an insurance company that will issue a bond. An additional requirement for such bonds is the cost of discharging the bond when the estate administration is complete.

To avoid these problems and added costs, an executor or trustee should be (and remain) a resident of Canada while the estate or trust is administered.

To avoid problems with foreign executors or trustees, a Canadian-resident friend or a professional such as a lawyer or an accountant could be appointed. Another alternative is a Canadian trust company which can act as an executor or a trustee. However, most trust companies will expect the estate or trust to be valued at \$300,000 or more on an on-going basis to ensure that taking on the role of executor or trustee will be financially viable. Any professional who accepts an appointment as executor or trustee will likely have similar requirements as to the minimum estate or trust value.

Rather than including a trust in a Will, if the goal is to ensure that a beneficiary receives regular payments on a periodic basis (monthly, annually, etc.), an annuity could be worth considering. Once an annuity is purchased by the executor, the estate can be wound up and the executor would no longer need to be involved.

### Attorneys under a Power of Attorney

Naming a foreign resident as an attorney in a power of attorney for property might appear to be less of a problem. After all, there is no requirement that a non-Ontario or non-Canadian resident post a bond as an executor or trustee would be required

to do. Furthermore, the Ontario *Substitute Decisions Act* (the primary legislation governing powers of attorney in Ontario) does not require that an attorney for property (or personal care) be an Ontario or even a Canadian resident.

However, there are a number of reasons why it may not be a good idea to name a foreign attorney.

In terms of Canadian tax laws, the Canada Revenue Agency (CRA) could take the position that the grantor (the person who signed the power of attorney) could be deemed to have left Canada, resulting in departure tax and non-resident withholding tax. However, if there is no evidence that the grantor is anything other than a Canadian resident and she or he is physically present in Canada, there may not be a tax concern.

An attorney acting under a power of attorney is considered to be an 'agent' as long as the grantor is capable. The attorney is not a trustee while acting in the role of agent, so the rules governing the residence of trusts should not apply.

The difficulty that a non-resident attorney (and ultimately, the grantor) may encounter is related to regulatory restrictions under which investment dealers operate. The Investment Industry Regulatory Organization of Canada (IIROC) is the national self-regulatory organization of securities dealers. Its members must abide by its regulations.

If an investment dealer is instructed by an attorney who is not a resident of Canada, the dealer is required to consider a number of legal, compliance, and tax issues. These include compliance with foreign securities laws, Canadian anti-money laundering regulations, and Canadian and US withholding tax/US 'qualified intermediary' requirements.

The applicable laws in the dealer's client's country of residence will govern whether the dealer can take instructions from that client and, if so, subject to what conditions, as well as the types of products and services that can be sold to, or held by, the client. Most dealers have policies that restrict dealing with a non-resident, because of the potential legal and regulatory risks.

If policy restricts dealing with non-resident clients, the question is "Who is the dealer's client"?

For example, Betsy has always lived in Canada. She sets up accounts with her dealer. Some years later, she develops Alzheimer's and is declared incapable. In her power of attorney for property

document she has named her two daughters as her attorneys. At the time that Betsy signed the document, both daughters were living in Canada.

However, when Betsy became incapable, both daughters are now retired and live outside Canada.

Can Betsy's dealer take instructions from Betsy's daughters on Betsy's behalf? The dealer needs to determine if he or she must now treat the attorneys as clients, or whether the dealer still treats Betsy as the client. In some cases, dealers treat the attorney as the client and, as a result, their policies would prohibit them from taking instructions from attorneys who are not resident in Canada regardless of the fact that Betsy still lives in Canada.

### **Foreign Attorneys – Solving the Problem**

To solve the problem, one of several possibilities could be considered:

1. If a non-resident attorney is named, the power of attorney document could allow the non-resident attorney to appoint an additional or replacement attorney which could be a Canadian trust company or individual.
2. The power of attorney document could allow the foreign attorney to delegate decision-making responsibilities relating to investing to a Canadian trust company or individual.
3. The power of attorney document could name both a Canadian resident attorney and a non-resident attorney acting jointly but expressly provide in the document that the non-resident attorney may delegate investment decision-making functions to the Canadian attorney.

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