Without Bounds: Administration Issues for International Estates

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It is not unusual for an estate administration to have multiple international elements. These elements can be roughly grouped into two categories; the first group involving the deceased who was ordinarily resident or domiciled[2] in BC who owned property in different jurisdictions at the time of his or her death and the second involving a non-resident deceased who owned British Columbia *situs* property. The personal representative of a non-resident deceased may also be a non-resident or probate processes may be required in multiple jurisdictions. Further complexity is added to any estate administration where the estate beneficiaries are resident of differing jurisdictions.

This paper touches on some of the threshold concerns that arise in the administration of estates with international aspects and offers general information and resources when considering these issues. Since different jurisdictions apply different criteria to estate administrations specialized advice in each jurisdiction may be necessary in order for the estate administration to be completed; this paper simply offers a starting point. This paper does not address the conflicts of law rules, including the choice of law rules as they relate to estate in any great detail but rather focused on the practical conundrums that the clients will face when embarking on an international estate administration journey.

A: Client identification, translation and document verification

Matters of client identification, translation and document verification are potentially relevant in all estate administrations but additional issues arise in estates where the deceased and/or personal representative are non-residents. Although, translation services can also be required where an ordinarily resident BC deceased has died in a foreign jurisdiction and the death certificate is issued in a non-English language, where the personal representative is required to deal with non-resident beneficiaries or where the personal representative must interact with assets in a different jurisdiction, these services will an absolute necessity.

(i) Client identification

The Law Society of British Columbia sets out the requirements for general client identification and verification requirements. Law Society Rules 3-98 to 3-109 set out the procedures that are required when retained by a client to provide legal services and a checklist is provided at https://www.lawsociety.bc.ca/docs/practice/checklists/A-1.pdf. Since most estate administrations will involve legal services in respect of financial transactions, the full verification process is advisable at the commencement of the solicitor-client relationship.

[1] The writer gratefully acknowledges research assistance provided by Jeffrey Bichard.
[2] A discussed of domicile for succession purposes is discussed in Chapter 10 of *British Columbia Estate Planning and Wealth Management Preservation* published by CLE. See also, Canadian Conflict of Laws, 6 ed., 2005, Jean-Gabriel Castel and Janet Walker, Lexis Nexis Butterworths (looseleaf service).

Client identification and verification usually involves confirming information on full name, addresses and occupation and obtaining a copy of the potential client's identification during a physical meeting before work begins. However, when a client is not present in Canada, the lawyer may rely on an agent to obtain the information required to verify the identity of the client under Rule 3-104(4) provided that the BC lawyer has an arrangement in writing with the agent for this purpose. The Law Society provides a sample agency agreement in its checklist package noted above.

The potential client will need to attend before the agent so that he or she may complete the client identification. At that meeting the agent will examine the potential client's valid, original, government-issued identification (such as driver's licence, birth certificate, health insurance card, passport, or similar record), attest, on a legible photocopy of the identification document, that he or she has seen the identification document, and place, on the photocopy of the identification document his or her name, occupation, and address, his or her signature and the type and number of the identification document. The agency agreement should be entered into prior to the identification process.

When dealing with a non-resident client it is usually prudent to request a retainer for fees to cover at least some of the future services to prevent any multi-jurisdictional collection issues at a late. Furthermore, when providing legal services in BC to a client who is non-resident it is important to consider the supply rules for services relating to GST and PST. All legal fees for services in Canada are subject to GST/HST. However, certain legal fees rendered to non-residents are characterized as "zero-rated supplies".[3] Where the supply of an advisory, professional or consulting service is made to a non-resident person but includes a service in respect of real property situated in Canada or tangible personal property that is situated in Canada at the time the service is performed, then the services will not be zero rated but require GST or HST.[4] Whether GST or HST is charged is determined under the "place of supply" rules.[5] Generally, legal services provided in connection with litigation (which would include the probate application) are under the jurisdiction or a provincial court or tribunal established under the laws of a province are deemed to be "supplied" in that province. Also, where real property is involved the legal services are "supplied" in the province where the real property is situate. PST of 7% is also charged where the recipient of the legal services resides or carries on business in BC. Where the services are being provided to a non-resident PST may not be required unless the services relate to certain exceptions, the most common being services related to real property located in BC or BC litigation. In the case of an international estate where the services relate to BC (i.e. the estate's real property or litigation in BC) then PST will also need to be charged on the bill.[6] In rare cases, it may be necessary to charge and collect both HST and PST on fees.

In circumstances where the BC element in the estate administration is secondary to a non-resident estate with a foreign personal representative, it is common for the foreign lawyer who has already assisted with the primary administration to be the first point of contact. In those cases, the

[3] See Schedule VI of the *Excise Tax Act* and section 23 of Part V of Schedule VI.
[4] http://www.cra-arc.gc.ca/tx/bsnss/tpcs/gst-tps/gnrl/stps/cllct-eng.html#type
[5] See *Excise Tax Act*, Schedule IX and associated regulations
[6] http://www.sbr.gov.bc.ca/documents_library/bulletins/pst_106.pdf

identification and verification and even translation may be a relatively efficient process with foreign counsel guiding the way and providing documents from the originating jurisdiction.

(ii) Translation and Interpretation

If the clients are not conversant with the lawyer's spoken languages or the estate documents are written in a non-English language, it may be necessary to engage to services of a translator and/or interpreter to facilitate communication and the estate administration.

Translators convert written material from one language to another and interpreters translate oral communications. Translation in BC is a non-regulated profession. However, there are a number of certifying bodies and professional associations which do provide certification processes. The Society of Translators and Interpreters of BC (STIBC) offers certifications for translators, court interpreters, and conference translator or interpreter in BC[7]; the Canadian Translators, Terminologist and Interpreters Council also provides national certification[8]; the Association of Translators and Interpreters of Ontario (ATIO) has an Ontario certificate[9]; and, the American Translators Association also has a certificate of professional competency.[10]

The death certificate will be issued in the jurisdiction where the deceased died and translation may be required for certain transactions. A translation of all death certificates in a language other than English made by an official translator in the form of an original statutory declaration sworn before a notary public or lawyer will be required when dealing with the Land Title Office, for example to transmit title to a surviving joint tenant. In addition, if the name of the death certificate is not the exact name appearing on the registered legal title, additional information will be required to support the identity of the deceased.

Pursuant to section 80 of the *Wills, Estates and Succession Act* (the "WESA") a will is valid as concerns the formal requirements for making the will and is admissible to probate if, among other things, it was made in accordance with the law of the place where it was made, the law of will-maker's domicile either at the date of making or the date of death, the law of the will-maker's ordinary residence either at the date of making or the date of death, with the law of BC (even where the will is made outside of BC) or the law of the place where the property is situated at the making or date of death. Where an estate administration necessitates that non-English documents are included in the application for a grant pursuant to Rule 25-3(2) or (3), these documents should be filed along with a translated copy attached to a Form P12 Affidavit of Translator which is filed concurrently. It is recommended that the translator is independent from the deceased and his or her family.

(iii) Document Verification: Apostille, Authentication and Legalization

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[7] https://www.stibc.org/
[8] http://www.cttic.org/mission.asp
[9] https://atio.on.ca/
[10] http://www.atanet.org/certification/landing_about_certification.php

When dealing with multiple jurisdictions, organizations and governments often require that legal documents are authenticated before they will be accepted. The process required will be dependent on the recipient jurisdiction. Consular officials at the Embassy of Canada in other jurisdiction often have the authority to perform a variety of notarial services for Canadians were a public notary in that jurisdiction is not able to perform the services for the recipient jurisdiction.

Other jurisdictions seeking to use Canadian documents will often request that an Apostille is provided. An Apostille is a certificate issued by a designated authority in a county where the Hague Convention Abolishing the Requirement for Legalization of Foreign Public Documents[11] is in force. See sample Apostille Certificate at https://assets.hcch.net/upload/apostille.pdf. However, Canada is not a signatory of the Apostille Convention.

Instead Canada has a certification process which is an authentication and legalization. Essentially, authentication is the process which certifies the genuine nature of the signature, seal and position of an official who has the authority to execute, issue, or certify a document so that a document executed, issued or certified in one jurisdiction may be recognized in another jurisdiction. Legalization is getting the document stamped and signed a consular officer at the appropriate foreign consulate or embassy in Canada.

Global Affairs Canada provides a two-step authentication process for certain documents, including long form birth certificates, marriage, divorce, death documents and powers of attorney. Photocopies must be certified appropriately as true copies by a Canadian notary public or a Commissioner of Oaths, paying heed to the rules of the province or territory where the document has been certified. Documents originating in Canada in a foreign language must be translated into English or French and certified by a Canadian certified translator, and by a Canadian notary public or Commissioner of Oaths. Documents that originate in a foreign country must be signed and sealed by an official of that country's embassy, high commission or consulate accredited to Canada. The signatory's name must be printed in the Latin (western) alphabet. If a translation is required of these documents by the recipient institution, it must be certified appropriately by both a certified Canadian translator and Canadian public notary or Commissioner of Oaths. The mail-in processing time is at least 20 days.[12] See for further information. There is a processing fee of $30 for each document to be authenticated.

In BC, the authentication of documents is managed by the Ministry of Justice Order in Council (OIC) Administration Office and authentication means essentially that the signature of the BC official who signed the document has been authenticated by the Government of BC.[13] The website provides a list of documents that can be authenticated, including all documents issued by the Vital Statistics Agency (e.g. long form birth certificates, marriage certificates and death certificates), certified true copies of documents held by government office (e.g. documents issued by the Supreme Court or the Registrar of

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[11] https://www.hcch.net/en/instruments/conventions/full-text/?cid=41

[12] http://www.international.gc.ca/department-ministere/authentication-authentification_documents.aspx?lang=eng#docs_birth

[13] http://www2.gov.bc.ca/gov/content/governments/government-id/guide-to-the-authentication-of-documents/types-documents

Companies) and documents that have been notarized by a lawyer or notary public who then has his or her signature authenticated through the OIC Administration Office. Documents notarized by a BC lawyer, whose signature has already been verified **in advance** by the OIC Administration Office, can be sent directly to the office. Documents notarized by a BC notary public must be sent to the Society of Notaries Public of BC . The society sends the document to the OIC Administration Office to authenticate the signature of the notary public.

The Law Society of British Columbia provides instructions on the process for a BC lawyer to have his or her signature authenticated[14] so that documents can be notarized for certain foreign purposes. There is a required fee of $26.25 for each certificate of authentication. The process requires that the lawyer's original signature can be authenticated on a document which has also has the lawyer's Notary's seal attached.

The document verification process can be relatively technical and where time limitations are urgent, it can be efficient to refer the clients to a specialist who deals specifically with this process so that the documents can be obtained with the minimal expense. For example, Brosgall Legal[15] and ALSCanada[16] are both notary firms that specialize in assisting clients with rapid Authentication and Legalization of international documentation.

On occasion a BC lawyer who has assisted clients with estate plans which encompass assets in other jurisdictions will be requested to provide a Certificate of Standing that indicates that the planning lawyer is licensed to practice law in BC at the time that the international Will was made. Such certificate is requested from the Law Society, costs a $78.75 and takes approximately two days to issue.[17]

(iv) Execution of Documents in Foreign Jurisdiction for Use in BC

Where the estate administration client is non-resident, it is common for the BC lawyer to prepare the BC probate documents for execution in the different jurisdiction. In such circumstances, it is imperative that (1) the lawyer communicates the required rules to the professional in the other jurisdiction who will be assisting and (2) ensures that the professional is qualified pursuant to our provincial requirements.

The requirements for the execution of an affidavit that can be used in a BC proceeding are prescribed in section 63 of the *Evidence Act*.[18] Most commonly, the affidavit will be sworn in the presence of a notary public for the jurisdiction in which the deponent is present. The deponent must sign the affidavit (once sworn or affirmed) and the notary public must sign, date and seal the affidavit as indicated on the *jurat*. All the exhibits must be physically attached and be identified by the deponent to the notary public when the affidavit is sworn or affirmed. The notary must sign, seal and date the exhibit stamps.

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[14] https://www.lawsociety.bc.ca/page.cfm?cid=150&t=Certificates-of-good-standing
[15] http://vancouvernotary.biz/article/brosgall-legal-apostille-services-1000-legalizations-100-countries
[16] https://www.alscanada.ca/what-we-do/apostille-authentication-service/
[17] https://www.lawsociety.bc.ca/page.cfm?cid=150&t=Certificates-of-good-standing
[18] *Evidence Act*, RSBC 1996, c, 124

It is necessary to provide comprehensive instructions for the foreign notary public to ensure that the finalized affidavit will be admissible. Notary publics from some jurisdictions may question or refuse to sign the *jurat* in its current form without additional discussions or may impose additional restrictions on the document. In civil law jurisdictions, including Quebec, it is usually a commissioner of oaths who administers oaths and solemn declarations.[19]

Where BC Land Title documents are being executed, for example the Form 17 Transmission or the Form A Transfer, it is imperative that these documents are completed properly in the presence of an "officer". The requirements for the attestation are set out in Part 5 of the *Land Title Act*[20] and an officer means a person before who an affidavit may be made under the *Evidence Act*. In the case of an instrument that is executed by an individual who appears to the officer to be unable to read English or sign his or her name in English characters, the signature of the officer is, in addition to the certification in section 43 of the *Land Title Act*[21], a certification by the officer that the individual appeared before and acknowledged to the officer that the contents and effect of the instrument were sufficiently communicated to the individual and that the individual fully understood the contents of the instrument is required.

B: Probate Jurisdictions, Reseals and Additional Grants

Sometimes choices can be made about which jurisdiction will be the primary probate jurisdiction and which jurisdictions may require resealing or ancillary grants. Most commonly, the initial grant will be obtained in the jurisdiction where the deceased was resident/domiciled. Probate fees or taxes may be incurred by the estate in every jurisdiction in which probate is required. Depending on the particular nature of the assets in the deceased's jurisdiction of domicile at the time of death, no probate grant may be needed in that jurisdiction, in which case the application in the non-domicile jurisdiction could issue the initiating grant.

Since the law of the deceased's domicile at the date of death will govern the distribution of the deceased's movable property[22] and the law of the domicile at the date of the execution of the Will govern its formal validity, capacity and undue influence, the personal representative should always consider whether the deceased who was ordinarily resident in this jurisdiction was also domiciled here. Choice is a factor in domicile. If there appear to be discrepancies, additional legal analysis is recommended prior to making the initial application for the Grant.[23]

The personal representative must also determine which of the deceased's assets are immovable property and which can be characterized as intangible personal property. While the *situs* of real

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[19] http://www.justice.gouv.qc.ca/english/sujets/glossaire/comm-asser-a.htm. See also *Courts of Justice Act,* R.S.Q., chapter T-16, ss. 214 and 219(e) for Quebec.

[20] *Land Title Act*, RSBC 1996, c. 250

[21] The signature of the officer witnessing the execution of an instrument by an individual is a certification by the officer that (a) the individual appeared before and acknowledged to the officer that he or she is the person named in the instrument as transferor, and (b) the signature witnessed by the officer is the signature of the individual who made the acknowledgement.

[22] *Jewish National Fund v. Royal Trust Co.* (1966), 53 D.L.R. (2d) 577 (S.C.C.)

[23] See *Scott v. Vanston,* 2016 SKCA 75 (CanLii)

property is relatively straight forward, being any interest in land, buildings, improvements and fixtures and mortgage interests, certificates and instruments, such as stock certificates, promissory notes and private company shares can attract a more nuanced analysis and are largely considered intangible personal property. [24]

(i) Probate in BC

Pursuant to the definition provisions of the *Probate Fee Act*[25], where a deceased was ordinarily resident in BC and a Grant is applied for in BC, probate fees will be exigible on the gross value of the assets (except for secured debt which may be deducted and "real and tangible property" that is not situated in BC) that pass to the personal representative at the date of death.[26] Therefore, the personal representative is not required to pay probate fees on the value of the deceased's real or tangible personal property that is not situated in BC but will attract probate fees for many assets, including foreign bank accounts, interests in businesses, partnerships, trades or professions and shares or stocks. There is an initial probate filing fee of $200 and then an approximate fee of 1.4% of the gross value.[27] In Canada, only Ontario has a higher probate fee rate than BC but Ontario also has a well-established multiple Will regime which clearly utilizes probate and non-probate Wills.[28]

Pursuant to section 122 of WESA and the Statement of Assets and Liabilities that is attached as Exhibit A to the Form P10 (for a domiciled grant, the applicant for the Grant is now required to disclose only the property that passes to the applicant as the deceased's personal representative which does appear to permit a multiple wills strategy[29] in BC where the deceased's estate has been organized so that those assets requiring a probate grant (such as real property or bank accounts with a value of more than $50,000) pass to one personal representative who will make an application for a Grant and other assets, such as private company shares[30] and shareholder loans, will pass under a separate Will to an alternate personal representative. The multiple Will strategy applies whether the Wills are drawn for assets in both the same or different jurisdictions. Subsection 122(1)(b) clearly contemplates that a personal representative does not have to disclose information on property that is situated outside of BC.

Where the deceased was non-resident of BC but owned immovable property in BC (i.e. real property, leaseholds and mortgages secured on land) then generally a Grant will be required in BC to deal with this property. Regardless of the deceased's domicile at the date of death, his or her immovable BC property will be subject to the WESA variation provisions. Where the Public Guardian and Trustee

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[24] See Chapter 7 of the BC Probate and Estate Administration Manual for full discussion.
[25] *Probate Fee Act*, SBC 1999, c. 4
[26] *Probate Fee Act,* s. 2
[27] $6 fees are paid for every $1,000 by which the estate exceeds $25,000 to $50,000, plus $14 for every $1,000 or portion thereof by which the value of the estate exceeds $50,000.
[28] *Granovsky Estate v. Ontario* (1998), 21 E.T.R. (2d) 25 (Ont. Gen. Div)
[29] Subsection 122(1)(b) of WESA provides, *inter alia*, that an applicant for a grant of probate or administration must "disclose information as required under the Rules of Court concerning the property of the deceased person, irrespective of its nature, location or value, that passes to the applicant in his or her capacity as the deceased person's personal representative."
[30] Pursuant to section 118 of the *British Columbia Corporations Act*, shares can be transmitted to the personal representative either on production of (1) a Grant or (2) the original or an authenticated copy of the Will.

becomes aware of a person under disability ordinarily resident outside the Province who has variation rights and for whom no person ordinarily resident within the province is prepared to act as *guardian ad litem*, the Public Trustee may act as *guardian ad litem* in order to preserve a right of action which may accrue to such person under disability.[31]

It is possible that a deceased who was ordinarily resident in BC owns no property in BC at the date of his or her death that requires the probate process to be initiated in BC. However, a Grant may still be necessary in other jurisdictions to deal with immovable property *situs* there. In such case it may be most advantageous to avoid the BC probate fees and where possible initiate the application in a secondary jurisdiction, particularly if Alberta, NWT and Nunavut, Yukon or Quebec are involved since those jurisdictions enjoy much lower probate fees. For example, if the BC domiciled deceased owned a BC principal residence in joint tenancy, BC bank accounts in joint tenancy, BC private company shares (valued at approximately $5,000,000) and an investment property in a different province, the jointly owned assets would pass by survivorship to the surviving joint tenant and the private company shares could transmit to the personal representative without the requirement to initiate a Grant and therefore savings of the probate fees of approximately $70,000 could be achieved in BC. In such a case, the initial grant of probate could be sought in the secondary jurisdiction where the investment property is situate. It is likely that additional communications may be required with the out of province advisor and bonding requirements may be applied in that jurisdiction if the personal representative is also non-resident so that the foreign Court secures jurisdiction over the applicant. However, it should be noted that since the deceased was resident in BC, BC law would govern the estate administration in regard to the movable property (the shares) and since no Grant would be issued in BC the limitation period in regard to the variation provisions of the WESA would not commence which could leave the executor vulnerable to a future personal liability if those assets were distributed without the protection of the Grant.[32]

Furthermore, if the executor is a non-resident of the secondary jurisdiction where the Grant issues and prefers to open the estate bank account in his or her home jurisdiction (BC), he or she should be advised to proceed with care. The writer is aware of at least one circumstance where the executor received the primary Grant in a different province and then proceeded, with full advice of the BC bank, to open a BC estate bank account by presenting the foreign Grant. However, when the executor attempted to distribute the estate funds from the BC estate bank account, the bank then refused to release the funds to the executor without a BC Grant and thus, caused a second probate process in BC which attracted the full probate fees on the movable assets (the private company shares) and further delayed the estate administration.

(ii) Non-resident - Resealing or Secondary Probate Required

If a primary Grant has already been obtained in another province or territory of Canada or in one of the prescribed jurisdictions[33], then pursuant to subsection 138(1) of WESA an application can be made to

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[31] *Williams (Guardian of) v. Williams Estate*, 1991 CanLII 895 (BCCA)

[32] *WESA*, section 155

[33] Any member of the British Commonwealth of Nations (see www.thecommonwealth.org), any States of the U.S. and Hong Kong; see the *Wills, Estates and Succession Regulation, BC Reg. 148/2013, Schedule B.*

reseal the foreign Grant. Pursuant to subsection 138(2)(b) of WESA and the Statement of Assets and Liabilities that is attached as Exhibit A to the Form P11 (for a non-domiciled grant), only the BC property that passes to the applicant are disclosed. Rules 25-6 to 25-9 apply to resealing a foreign Grant. An original or a copy of the foreign Grant certified by the issuing Court and if the Will is not attached to the foreign Grant, a Court-certified copy of the Will must be filed with the application. Rule 25-6(4) allows the Registrar to request further information about the domicile of the deceased. If the application is successful, the Registrar will issue a Form P28 Resealing Certificate attached to the certified copy of the foreign Grant.[34] Pursuant to Rule 25-7(8), the Registrar must provide notice of the resealing to the court that issued the foreign Grant.

Section 140 of WESA provides that if the foreign Will would be invalid in BC due to deficiencies, an application pursuant to section 58 may be made as part of the application.

Where foreign grants cannot be resealed either an ancillary grant can be applied for pursuant to section 138(4) of WESA or pursuant to section 139 of WESA a grant of administration can be made to the attorney of the personal representative appointed by the foreign court. Notably, section 139 (appointing the attorney) only becomes an option where a foreign Grant has issued. To proceed under this option, it is recommended that the proposed attorney (usually a BC resident for convenience and often a professional) reviews the Will (if applicable) and also the provisions of sections 1 through 5 of Part 1 of the *Power of Attorney Act*[35] which expressly govern payments made or acts done under a representation grant that is issued to a person as an attorney for some other person under WESA. It is current practice that the *Power of Attorney* be executed under seal.[36] It is also recommended that the attorney discuss his or her requirements for remuneration and indemnities prior to entering into the engagement and ensures that the Will has a charging clause.

In cases where the only property in BC is movable property, for example private company shares and bank accounts[37], then it may be possible for the foreign executor to deal with the property without the need for any further process if the institutions with the assets will accept an indemnity or some other security.

(iii) Resealing a BC Grant

In circumstances where the deceased was domiciled in BC and the initial Grant has been obtained in BC, it may be necessary for the personal representative to reseal or commence a process in other jurisdictions to deal with the deceased's immovables. The process will be governed by the relevant jurisdiction and the personal representative will need to engage local lawyers to assist. It is likely that the foreign lawyers will initially rely on the BC counsel to assist with their identification processes and also to properly verify documents.

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[34] See Chapter 8 of the BC Probate and Estate Administration Manual for details on bringing a Foreign Grant into BC

[35] *Power of Attorney Act,* RSBC 1996, c. 370

[36] BC Probate and Estate Administration Manual, Chapter 8

[37] It is possible that even where the account assets are less than $25,000, the bank will be reluctant to deal with the personal representative without a BC Grant.

Rule 25-7(9) provides that where a BC Grant has been resealed in a different jurisdiction, the Registrar must notify the resealing court if any revocation or amendment is made to the BC Grant.

If the deceased was resident and domiciled in BC at the date of death and a BC Grant has issued, this Grant does not need to be resealed in Quebec in order the personal representative to deal with Quebec property. If the personal representative's authority clearly extends to the Quebec property then the probated Will may deposited with a notary who then issues a certified copy. The personal representative will require the services of a notary licensed in Quebec to deal with the real estate in that province. Since Quebec does not recognize the right of survivorship of a surviving joint tenant, the interest of any property of a deceased will pass through the estate and not to the surviving joint tenant.[38]

C: Multiple Wills and Global Wills

From a planning perspective, clients are advised to seek legal advice in each jurisdiction where they own immovable property and in the best scenarios have a plan that contemplates the international properties long before the estate administration comes into play. Where a client resides in one jurisdiction but is actually domiciled in another, it will be important to consider at the planning stage what laws will apply to the movable property. In addition, since Powers of Attorney may not be valid outside the jurisdiction they are executed in clients are advised to engage in incapacity planning, tax planning and probate planning during their respective lifetimes to deal with assets in other jurisdictions; if these measures have been in place there will often be less problems for the personal representatives when it comes time to administer the estate.

(i) Multiple Wills for International Assets

It is recommended that a client makes a Will for each jurisdiction where he or she owns immovable property to ensure that the estate administration process is streamlined in that jurisdiction or, at a minimum, has counsel from that jurisdiction review his or her global Will if the client is intent of having a single Will govern his or her entire estate to ensure that the Will would be accepted.

If the client owns property in a foreign civil law jurisdiction any distribution plan under the Will may be restricted by that jurisdiction's forced heirship rules unless the Will is properly planned.[39] Furthermore, useful planning strategies may be overlooked if local counsel is not engaged to advise on the particular tools available in each jurisdiction. For example, some offshore jurisdictions have enacted rules to permit individuals in certain circumstances to protect their estates against forced heirship claims.

As of August 17, 2015, the *EU Succession Regulation* (known as Brussels IV)[40] was brought into force and allows "nationals" of any state, including non-EU states and EU states, to make a choice through a properly worded Will to apply their national laws to the succession of assets in other EU states.

[38] See STEP Wills, Trusts and Estate Administration, Chapter 7: Quebec Issues for Canadians Outside Quebec

[39] World- wide map of legal systems: http://www.juriglobe.ca/eng/index.php

[40] *EU Succession Regulations* (EU 650/2012) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0107:0134:EN:PDF

Pursuant to Brussels IV, a BC national, who is ordinarily resident and domiciled in BC, and who owns a property in a Regulation Member State (for example, a gite in Provence (France)) may make a Will dealing with his French real estate in which he selects that BC law should apply in relation to the succession of his whole estate, including the French gite. This should successfully remove the distribution of the gite from the French forced heirship regime. However, in the case of BC this will expose the gite to the variation provisions of the WESA which the client may find more or less beneficial.

It is recommended that clients owning EU property should plan to review their existing Wills dealing with that property with their international advisor to ensure that they are taking best advantage of the changes implemented by Brussels IV. Brussels IV also provides for application for a European Certificate of Succession which allows beneficiaries to prove that they are heirs and administrators throughout the EU without excessive formal processes.

A number of US States offer the planning opportunity to make a Transfer-on-Death Deed which transfer US real property upon death without requiring probate proceedings to deal with that property that could easily be overlooked without the client receiving timely cross-border advice at the planning stage. The deed will name the owner, describe the property and name the transferee along with a clear statement that the deed does not take effect until the death of the owner. At the death, the property passes immediately to the beneficiary along with any mortgage or debt attached to the land. The process for recording the new ownership is simpler that probate but specific to the State involved. The personal representative will still need to take into account the U.S. estate tax regime and remember that the U.S. Estate Tax Return must be filed within 9 months of the date of death unless an extension has been granted.

(ii) Multiple Wills for BC Assets

It has already been noted that section 122 of WESA requires the applicant for the BC Grant to disclose only the property that passes to the applicant as the deceased's personal representative and this appears to permit a multiple wills strategy for BC residents to make a probate Will and a non-probate Will under which they appoint separate personal representatives to deal with specific assets. However, when this multiple Will strategy has been implemented by a deceased who was ordinarily resident in BC, the personal representative who makes a distribution of the non-probate BC estate without the protection of the statutory steps (i.e. obtaining a grant of probate, advertising for creditors and waiting the requisite 210 days after the representative grant before distribution) could potentially be exposed to personal liability for distributions if such distributions. For example, if the distributions depleted the estate for creditors or beneficiaries, if the distribution was successfully challenged under the WESA's variation provisions at some later date or if the Will was later challenged and declared invalid. The personal representative who seeks to distribute without having obtained probate is advised to conform with the requirements of sections 154 (advertising for creditors) and 155 of the WESA.

Section 155 of the WESA requires the personal representative who distributes prior to 210 days after the issue of a grant of probate to obtain either (1) the consent of "all the beneficiaries" and the "intestate successors entitled to the estate" or (2) a court order. "Beneficiary" is a defined term in the

WESA meaning "(a) a person named in a will to receive all or part of an estate, or (b) a person having a beneficial interest in a trust created by a will". This definition raises two concerns. First, while a person with a vested or contingent interest under the terms of the trust is captured by the definition, a person who is a potential object of a mere power or trust power may not be properly qualified under the definition as a "beneficiary". Second, even if the definition does capture the potential objects of the power, many of these "beneficiaries" are minors or unborn and therefore cannot consent to the distribution. The executor cannot be discharged by the contingent minor and unborn beneficiaries of the trusts created under the Will. Without a formal passing of the accounts before the court, there would always be the potential that the minor and unborn beneficiaries may later complain about the executor's administration of the estate; although this risk may be modest.

It is notable that subsection 155(1) does not specify that "a representation grant" must be for the particular Will under which the personal representative is making a distribution but subsection 155(2) clearly prohibits a personal representative from distributing the estate after the 210 days in circumstances where a proceeding has been commenced which may affect distribution of a deceased's estate. In *Etches v. Stephens*[41], a case which involved a double probate situation with one grant issuing several months after the first, the Court determined that the limitation period for the *Will Variation Act* (then in force) commenced on the date on which the first grant was issued and was not extended by the second grant. Therefore, there may be some momentum to the argument that a grant for one Will triggers the 210 limitation date for the estate generally. However, Etches could easily be distinguished since it dealt with only one Will governing the estate rather than multiple wills governing different assets. Furthermore in *Desbiens v. Smith*[42], the Court of Appeal confirmed the trial judge's decision that the limitation period for an applicant to commence an application to vary a Will does not begin to run where a personal representative has not made reasonable attempts to comply with the formal notice requirements. Though that case was in regard to the notice provisions under the former section 112 of the *Estate Administration Act*, it is plausible that similar scrutiny could be applied in the case of multiple Wills.

Unless all the persons required to give consent are *sui juris*, there could be considerable difficulty in obtaining the consents and an application for court approval may be necessary. Such application will add a layer of complication and expense to the multiple will strategy and any probate fee savings anticipated by the strategy should be balanced against the projected costs for making the application for a distribution order and a possible summary accounting which may be advisable as part of that application. Section 182 of the WESA clarifies that notices for minors must be given to every guardian of that minor and the notice must be given notice to "all interested parties". Once the matter is before the Court, the judge may be disinclined to make a distribution order based on the provisions of a non-probate Will if he or she has a concern that the validity of the Will has not been determined through the probate process. In such circumstances, though not binding on the BC courts, the Ontario Superior Court of Justice decisions in *Silver Estate v. Silver*[43] and *Waese v. Bojam*[44] may be instructive. In *Silver,*

[41] *Etches v. Stephens* (1994), 99 B.C.L.R. (2d) 171 (S.C.)
[42] *Desbiens v. Smith,* 2010 BCCA 394
[43] *Silver Estate v. Silver* (2000), 35 E.T.R. (2d) 287

Cullity J. approved a variation of trusts contained in an unprobated Will finding that the evidence before the Court in that application was more than sufficient to determine that the Will was valid without an application for probate. Similarly in *Waese*, Cullity J. found an unprobated Will valid for the purposes of approving the personal representative's accounts and ordering costs from the estate without requiring a probate application.

Therefore, the multiple will strategy is best suited for situations where the provisions of the second not-to-be-probated will make gifts only to *sui juris* beneficiaries, where there is little or no risk of either variation claims under Division 6 of the WESA or disinherited intestate successors who would be "entitled to the estate" if there were no will and who may have incentive to challenge its validity and in circumstances were the probate fee savings outweigh the cost of a potential petition application to the court to obtain an order sanctioning the distribution.

D: Applicable Law: International Intestacies

Where the Will provides the will-maker with choices on administration and distribution, an intestacy applies a legislative formula to determine who will be a beneficiary and the proportion of the estate that he or she is entitled to receive. Intestacies spanning multiple jurisdictions can be most complex. The conflicts of laws rules provide that the intestacy laws of the deceased's domicile will apply to the movable property whereas the intestacy laws of the location of real property govern that asset. It will be necessary for the client to engage lawyers who practice in the other jurisdictions to assist with the intestate estate administration.

The process for resealing a foreign Grant of Administration is comparable to the process for resealing a Grant of Probate. However, the intestate distribution scheme can vary greatly. Even within the Canadian provinces, while priority of some sort is usually given to a surviving spouse, the rules and proportions vary. For example in BC, under WESA the spousal provisions are set out in ss. 20 – 22 and s. 26 – 33 which provide special rights for the spouse to acquire the spousal home. Where all deceased's descendants are shared with the spouse, then the spouse will receive a preferential share of $300,000. and the remaining residue will be divided one half to the spouse and one half to the deceased's descendants. Whereas if the deceased's descendants are not all shared with the spouse, the spouse's preferential share will be $150,000. The spouse must exercise his or her option to acquire the spousal home from the estate within 180 days of the issuance of the Grant. In contrast in Manitoba, if the deceased and the surviving spouse share all the issue of the deceased, the spouse will receive the entire estate.[45] In Quebec, the spouse will receive the value of family patrimony plus one-half of the remainder of the estate.[46] Where the laws of international jurisdictions are involved the discrepancies on an intestacy may be even more diverse. However, the Court have been cautious to avoid the potential for "double dipping" in regard to the preferential share where possible.[47]

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[44] *Waese v. Bojam* (2002), 50 E.T.R. (2d) 139
[45] *The Intestate Succession Act*, C.C.S.M. c. 185, s.
[46] http://www.justice.gouv.qc.ca/english/publications/generale/patrimoine-a.htm
[47] See *Thom Estate v. Thom*, 1987 CanLII 5339 (MBQB); *Re Vak Estate*, 1994 CanLII 7323 (ONSC)

The rights on intestacy of a common law spouse or separated spouse may also differ considerably depending on the law of the jurisdiction at play, various dependant's relief laws and whether each jurisdiction recognizes common law spousal status. For example, in BC, a separated spouse, married or common law,[48] has no claim through WESA and would have to seek his or her rights to division of the property through the provisions of the *Family Law Act*. Under s. 198 of the *Family Law Act*, the limitation period requires that claims for family property by unmarried spouses are made within two years of separation. Alternatively, in Ontario common law spouses do not have the same statutory rights on an intestacy. The common law spouse has to pursue to the estate for dependant's support.[49] Whereas common law spouses in Nova Scotia are not included on the intestacy distribution list unless they had a registered domestic partnership[50] or a court will support a financial claim against the estate.[51]

Where the deceased was domiciled in BC, the applicant for a Grant of Administration will usually be making the initial application. The priority for application is set out in WESA section 130 with the spouse or an agent appointed for the spouse having top priority. The documents required for the application are ostensibly similar to the document required for the Grant of Probate and the Form P10 will be required where the application is for a domiciled grant. Section 128(a) of WESA provides that an applicant for administration is not required provide security unless a minor or incapable person has an interest in the estate or the Court, on application by a person interested in the estate, requires a bond.

E: Income Tax Filings and Compliance

This paper simply highlights some common issues that should be considered by the client in the international administration; specific advice will be required in every circumstance.

Clients are advised to work closely with an accounting professional, as well as their other advisors, when dealing with the taxation of the particular deceased and his or her international estate. Where an estate has cross-border elements, it will usually be important that professionals from each jurisdiction are engaged so that the client can ensure that he or she has met the required obligations for that locale. It is not unusual for the deceased to be accidently non-compliant in one or more of the jurisdictions and specialized tax advice to the personal representative many be required to deal with that concern. Where the deceased was a Canadian resident for income tax purposes and was non-compliant with his or her reporting, the personal representative may seek to make a voluntary disclosure on behalf of the deceased; expert tax advice will be required.

(i) Reminders for Canadians Inheriting from International Jurisdictions

[48] See *Wills, Estates and Succession Act*, section 2 definition of when two persons cease to be spouses for the purposes of WESA "(a) in the case of a marriage, an event occurs that causes and interest in family property…" and (b) in the case of a marriage-like relationship, one or both persons terminate the relationship.

[49] *Succession Law Reform Act*, R.S.O., c. 23, s. 71

[50] Couples who want to have a Registered Domestic Partnership must register with Vital Statistics: http://www.novascotia.ca/sns/access/vitalstats/domestic-partnership.asp

[51] *Intestate Succession Act*, RS 1989, c. 236

It is often overlooked that a Canadian domiciled beneficiary may have reporting obligations to Canada Revenue when he or she receives a gift or inheritance from an oversea's estate even though, in the majority of cases, the taxes associated with the estate will have been paid in the international jurisdiction and the beneficiaries will be receiving a non-taxable capital payment. Notably, if the cash distribution represents allocation of income from the foreign estate, then there may be tax implications in Canada. The beneficiary client is advised to discuss the inheritance with his or her accountant for assistance with the completion of a Form T1142 (Information Return in Respect of Distributions from and Indebtedness to a Non-Resident Trust). It should be noted that failure to comply comes with a penalty.

Furthermore, financial intermediaries, including banks, credit unions, trust and loan companies, and casinos, are required pursuant to the *Income Tax Act* (Canada) (the "ITA") to report all electronic fund transfers of $10,000 or more and also report where two or more electronic fund transfers of less than $10,000 are made on behalf of the same individual within 24 consecutive hours but collectively have a value of $10,000 or more (Form RC 438).

Where a distribution in kind (*in specie*) is being made for certain assets to a Canadian beneficiary from a non-resident estate, for example the transfer of publicly traded securities, the situation may be more complicated and it is important that professional advice is sought and received. Even where the securities are maintained in a foreign brokerage account, the beneficiary will be required to report the income, gains and losses from the point of the distribution and onwards.

Moreover, where foreign real estate is involved, the beneficiary may wish to establish an adjusted cost base for the property at the time he or she receives the distribution so that future capital gains can be easily assessed when the property is disposed of. When the property is disposed of (sale or death), income tax returns will be likely be required in the jurisdiction of the property and in Canada; foreign withholding taxes may be required in the foreign jurisdiction.

Canadian tax residents are required to follow the rules for reporting information about their specified foreign property ("SFP") with a cost base of $100,000 by completing an annual Form T1135. SFP includes funds in foreign bank accounts, shares in foreign corporations, interest in a non-resident trust, foreign rental property, foreign life insurance policies and tangible and intangible properties outside of Canada: it does not include personal use property such as a vacation home, art, and collections (e.g. coins or books).[52]

(ii) Reminders for Resident Estates Distributing to Non-Resident Beneficiaries

When distributing income to a non-resident, the personal representative must withhold tax under Part XIII of the ITA. The starting point is a 25% rate for income distributions subject to tax treaty rates which

[52] http://www.cra-arc.gc.ca/tx/nnrsdnts/cmmn/frgn/1135_fq-eng.html

may be available between Canada and the country where the non-beneficiary lives. The liability for the failure to withhold rests with the personal representative.

In many cases, the distribution of capital from the estate to one or more non-resident beneficiaries will also engage additional notification and clearance requirements set out in section 116 of the ITA. Generally, the distribution of capital is considered a disposition by the beneficiary of the beneficiary's interest in the trust; the estate is deemed to the "purchaser" of the interest. If the property involves "taxable Canadian property" ("TCP")[53], the personal representative will need to comply with section 116. In many cases, there will be little no taxes involved in obtaining the section 116 certificate, however, if the distribution is made without compliance, the personal representative is potentially subject to penalties and interest. [54]

Personal representatives may also wish to proceed carefully where payments are made from a Registered Retirement Savings Plan ("RRSP") or Registered Retirement Income Fund ("RRIF"). As a general principal, the estate of the deceased will be liable to pay the income taxes associated with RRSP and RRIF where the funds are paid out to designated beneficiaries. While the beneficiary designation puts the funds outside of the possession and control of the personal representative[55], the personal representative will want to ensure that there are sufficient assets in the estate to pay the associated tax liability before making any distribution of estate assets. If the personal representative distributes without heed to the income tax liability, CRA may find it easier to seek contribution from a resident personal representative or resident beneficiaries rather than non-resident beneficiaries of the RRSP and RRIF. Where there are insufficient assets available, the personal representative can either follow the Insolvent Estates provisions set out in Part 6, Division 12 of WESA or rely on the federal *Bankruptcy and Insolvency Act* for distribution priorities. It is always recommended that the personal representative avails himself or herself to clearance provisions of the ITA to protect from personal liability for such shortfalls.

(iii) New Issues with the *Property Transfer Tax Act*

Pursuant to changes to the *Property Transfer Tax Act*[56] additional property transfer charges apply to residential property transfers to "foreign entities" in the Greater Vancouver Regional District.[57] These amendments add a third tier to tax equal to 3% for properties with a fair market value exceeding $2,000,000 and add a separate tax equal to 15% of the fair market value of a property if the purchaser is a "foreign entity". Foreign entities are transferees that are "foreign nationals", foreign corporations or "taxable trustees". Foreign nationals are individuals who are not a Canadian citizen or permanent

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[53] Section 248 of the ITA

[54] BC Probate and Administration Manual, chapter 13

[55] Section 159(3) of the ITA

[56] *Property Transfer Tax Act*, RSBC 1996, c. 378, changes effective August 2, 2016

[57] GVRD includes Anmore, Belcarra, Bowen Island, Burnaby, Coquitlam, Delta, Langley City and Township, Lion's Bay, Maple Ridge, New Westminster, North Vancouver City and District, Pitt Meadows, Port Coquitlam, Port Moody, Richmond, Surrey, Vancouver, West Vancouver, White Rock and Electoral Area A. http://www2.gov.bc.ca/assets/gov/taxes/property-taxes/property-transfer-tax/forms-publications/is-006-additional-property-transfer-tax-foreign-entities-vancouver.pdf

resident; a taxable trustee will exist if any trustee of the trust is a foreign entity or where, immediately after registration, any beneficiary of the trust who is a foreign entity holds beneficial interest in residential property to which a taxable transaction would apply. Again, the term "beneficiary" is used without a precise definition.

In circumstances where the personal representative is tasked with realizing the assets of the estate, paying the debts and liabilities of the deceased and then distributing the estate's residue to beneficiaries, these changes may be of little consequence since the transmission of the property to the personal representative remains an exempt transmission. [58] However, where the deceased's had planned to make specific bequests to beneficiaries of real property, the new PTT requirements could be onerous for the beneficiary where a non-resident beneficiary is a recipient; it may be a good opportunity for clients with foreign beneficiaries receiving specific bequests to revisit their estate plans and reconsider how they would like to make the gifts from the estate.

The additional PTT (15%) applies to any applicable residential property transfer, even where the transaction would normally have been exempt from property transfer tax; it includes a transfer between related individuals, a transfer to a surviving joint tenant and a transfer where the transferee becomes a trustee in relation to the property even if the trust does not change. It is also worth noting that each transferee is jointly and severally liable for the additional tax payment. Therefore, if the foreign entity does not pay the required additional tax, any other transferees could be liable; collection will be easier against the resident transferees.

There are stiff penalties for filing the PTT return with incorrect or misleading information and these penalties apply to anyone who participates in the tax avoidance. The identity of Canadian residents and permanent residents should be verified using official government identification; SIN card should also be reviewed.

(iv) New Issues with the Vancouver Vacancy Tax

Starting in 2017, the City of Vancouver will levy a tax on vacant residential properties: see Vacancy Tax By-Law No. 11674. The tax will be administered through an annual declaration by the property owner regarding the status of the property. Residential property is considered to be vacant property if it has been unoccupied for more than 180 days during the reference period or it is deemed to be vacant under the by-law.

The vacancy tax should be of significant concern to executors and trustees of estates with residential property located in the City of Vancouver, particularly if the owner was a non-resident and had not previously complied with the filing requirements as these may present a liability in the estate.

While the by-law provides for an exemption in certain circumstances, there are procedures that the personal representative must comply with. For example, section 3.1 provides that the vacancy tax is not

[58] Section 14(3)(q) of the *Property Transfer Tax Act* and Exemption Code 9 http://www2.gov.bc.ca/assets/gov/taxes/property-taxes/property-transfer-tax/forms-publications/fin-579guide-instruction.pdf

payable if the residential property is unoccupied for more than 180 days in the year because the registered owner is deceased and neither a grant of probate nor a grant of administration for the deceased has been issued. The exemption must be claimed by the 2nd business day of February of the following year, which is the deadline for filing the property status declaration form which will be sent to all registered owners of property before December 31 of the year in question. Nonetheless, in order to preserve the exemption, executors, administrators and trustees should be aware of these deadlines and filings so that necessary charges and delays can be avoided. Late payments of tax will be subject to a penalty equal to 5% of the amount of the tax payable. Furthermore, if there is an error in the assessment of the tax or in the completion of the property status declaration form, executors and trustees should be aware of the deadlines of making a complaint and seeking a review.

It is not yet clear how a personal representative in the process of applying for the grant but not yet in receipt can complete the declaration as the "registered owner" since title would not have transmitted to that individual at the time of filing the declaration. This could prove particularly challenging in situations where the deceased registered owner has died intestate and no personal representative is appointed until the court has appointed an administrator. Presumably, by the time these reporting provisions are at play, essentially February 2018 for vacancies during the 2017 year, there will more practical guidance available from the City of Vancouver.

Furthermore, it is important to note that this exemption may only be claimed during year where no grant of probate or administration has issued. If an individual dies in June of 2017, and the property remains vacant for the rest of the year, the exemption can be claimed for 2017. But if the grant of probate is issued in February of 2018, this exemption will not be available for 2018. There is a further exemption available for registered owners if title to the residential property was transferred during the applicable vacancy period; in many cases, once the title has transmitted to the personal representative a sale may ensue and in those circumstances the personal representative would also be able to claim the transfer exemption. If the property is retained in the estate, however, without occupancy, the vacancy tax may apply.

F: The Best Laid Plans…

In conclusion, when advising clients at the planning stage it is important to canvass the full range of the client's assets so that overseas wealth issues can be effectively addressed. Where separate plans are made for different jurisdictions, great care must be taken by all the professional advisors to ensure that one plan does not accidentally revoke another plan [59] or that gifts are not repeated in multiple wills

[59] See for example, Rondel v. Robinson Estate, 2011 ONCA 493, The will-maker owned property in Spain, England and Canada and a jointly held property in Florida. In 2002 she made a Spanish Will to deal with her European property (Spanish and UK real estate and two Spanish bank accounts). The Spanish Will clearly referred to a Canadian Will to deal with all property outside of Europe. In 2005, the will-maker made a fresh standard will in Canada with a boilerplate revocation clause ("all my property of every nature and kind and wherever situate"). The solicitor engaged to assist did not enquire of foreign assets. In 2006, the will-maker added a specific bequest of $1,000,000 to the 2005 Will. The 2006 Will once again contained the general revocation clause and the solicitor did not enquire about the international property; he was not aware of the European property. The UK court refused to accept the 2002 Spanish Will to probate unless the 2006 Will was rectified to make it clear that the 2002 Spanish Will was not revoked by the 2005 Will and subsequently the 2006 Will. The Ontario Court of Appeal

unless that is the will-maker's specific intent. Where the estate administration is commencing, it is critical to work with the personal representative to identify the complex issues that arise across the various jurisdictions and work closely with the client and other advisors to ensure that the practical issues, including legal and tax effects, are addressed in the most effective manner.

upheld the trial judge's finding that the evidence of their parties and disappointed beneficiaries was not permitted to determine the will-maker's intent when she made the 2006 Will and it was determined that the will-maker's actions in making the 2006 Will had revoked the 2002 Spanish Will: rectification was not permitted.