

UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

**CONFLICT OF LAWS IN SUCCESSION MATTERS
(Wills & Intestacies)**

Preliminary Report

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Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, have not been adopted by the Uniform Law Conference of Canada. They do not necessarily reflect the views of the Conference and its Delegates.

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UNIFORM LAW CONFERENCE OF CANADA

[1] At the 2007 Annual Conference, Manitoba submitted a new project proposal respecting conflict provisions in succession matters (including wills and intestacies) which stated:

What is the current law in Canada?

In the common law jurisdictions, the validity of a will is governed with respect to movables by the law of the testator's domicile at the time the will was made and with respect to immovables by the *lex situs*. The deceased's estate is administered in the jurisdiction where he/she was domiciled at the time of death except for real property, which again is governed by the *lex situs*. Some jurisdictions have after-death provisions in their family-property sharing legislation. A surviving spouse/common-law partner's entitlement under such legislation is generally determined in the jurisdiction where the couple last maintained a common habitual residence. Depending on whether an individual dies testate or intestate, with real property in another jurisdiction, with a surviving spouse (common law partner) with outstanding family property rights or with other dependents, a number of different acts can be involved and complexities arise in inter-jurisdictional cases.

What changes to the law are being proposed?

Clear, comprehensive conflict of laws' provisions are proposed to address the full range of situations where more than one jurisdiction's laws apply to the administration of a testate or an intestate estate.

In 2003 the Law Reform Commission of Manitoba released a report entitled *Wills and Succession Legislation*. Among others, the report contained recommendations respecting conflict of laws' provisions in Manitoba's *Wills Act*, *Intestate Succession Act* and *Dependents' Relief Act*. The Commission recommended certain conflict of laws provisions to address situations where more than one jurisdiction's laws apply to the administration of a testate or an intestate estate. It favoured the approach in the 1988 *Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons*.

The Commission favoured a single rule for testate and intestate estates. Intestate succession legislation provides spouses/family members with certain preferential shares. These shares are not consistent across Canada and lead to uncertainty as to whether such shares should be cumulative, averaged or dealt with in some other manner. Similarly, family property entitlements are generally governed by the law of the jurisdiction where the spouses last maintained a common habitual residence. If a spouse dies domiciled in another jurisdiction, with real property in yet another, significant complexities can arise."

CONFLICT OF LAWS IN SUCCESSION MATTERS

The Questionnaire

[2] In an attempt to gauge the extent of the problem described and to assess whether there was any interest in proceeding with this project, Manitoba's Public Trustee sent a brief questionnaire to the Public Guardians and Trustees. The same survey was sent to Jurisdictional Representatives. Questions included:

1. Do you see this as a concern in your jurisdiction?
2. How frequently do you have to deal with conflicts issues regarding deceased estates, including intestacies?
3. Could you provide examples of the types of situations you have dealt with?
4. Does your jurisdiction have any legislation addressing these conflicts issues?
5. Are you aware of any plans for or work being done on legislation in this area?
6. Are you aware of any recent deciding cases or academic papers on the topic that we should be aware of?
7. Are there any experts that you are aware of that we might consult if this matter goes forward?

[3] A total of four responses formal were received (Saskatchewan, Northwest Territories, Alberta and Ontario) and indicated that while conflict of laws issues are of concern to jurisdictions, they do not appear to arise often. It should be noted however, that the private Bar might encounter these situations more frequently than the Public Trustees and Guardians because of the nature of the cases they handle. Based on the responses, there appears to be a patchwork across the country in terms of legislative provisions addressing conflicts. Some jurisdictions have conflict provisions in legislation governing both testate and intestate succession (Ontario); some deal only with testate succession (Alberta) and some with neither (Northwest Territories and Saskatchewan). Legislative provisions do not appear to be uniform.

Ongoing Work in the Jurisdictions

[4] Responses indicated that some work is ongoing in the jurisdictions in this area.

[5] The British Columbia Law Institute issued a report in June 2006 entitled *Wills, Estates and Succession: A Modern Legal Framework*, which had as its goals "to reduce the number of separate succession related enactments through consolidation and to modernize the statutory and common law dealing with succession on death."¹

[6] British Columbia recently introduced legislation based generally on the recommendations contained in this Report (although this legislation was not enacted in the Spring 2008 legislation session). While the Report does not include an extensive review of conflict issues, it addresses certain conflict of laws issues such as:

- (1) formal validity of a will. In summary, recommendations include:

UNIFORM LAW CONFERENCE OF CANADA

- continuation of British Columbia's current policy that a will should not be defeated on the grounds that it lacks formal validity if it would be valid under some legal system with which it, or the property it affects, or the testator, was connected.
- expanding the list of legal systems under which the formal validity of a will could potentially be upheld in a British Columbia court.
- permitting the courts to consider the formal validity of a will with reference to applicable foreign laws to take account of the change in the foreign laws subsequent to the execution of the will if it would have the effect of validating it under the foreign legal system in question.
- extending the same approach to terms in a will revoking a prior will.

The Report notes that “[m]atters of essential validity continue to be governed by non-statutory conflict of law rules: by the law the testator’s last domicile with regard to movables, and the law of the *situs* regarding immovables. For example, if the issue arises of whether a clause in a will excluding one of the testator’s two children from any share in the testator’s immovable property is valid and enforceable, it will be decided according to the law of the place where the immovable property is located.”²

- (2) abolition of the doctrine of *renvoi*. Commentary in the proposed *Wills, Estates and Succession Act* which forms part of the Report describes the doctrine as follows:

“... a confusing principle that requires the forum to take account of the conflict of laws rules of a legal system to which its own conflicts rules require it to refer. If the conflicts rules of the other legal system refer back to the law of the forum, this is a *renvoi*. (If the reference is to a third legal system, it is sometimes called a transmission or second degree *renvoi*.) Depending on the theory of *renvoi* which is applied, the forum may either accept the *renvoi* and apply its own domestic law or that of the third system, or reject it and put itself in the position of the foreign court applying all of the foreign law to an issue, including the foreign conflicts rules (double *renvoi*). Very paradoxical situations can arise, and the law is not settled as to what theory of *renvoi* should be applied in Canadian courts.

Renvoi typically arises in wills-related cases because reference to foreign law is often necessary to determine the validity of wills. The validity of a will with respect to movables is governed by the law of the testator’s domicile at death, and by the law of the place where the immovable is located (the *situs*) with respect to immovables. *Renvoi* was employed to find a way to apply a system of law under which a will might be upheld if it did not conform to the law of the final domicile or the *situs* of the immovable property.”³

CONFLICT OF LAWS IN SUCCESSION MATTERS

The Report recommends a simpler solution of enacting rules that allow a will to be upheld if it is valid under a wider range of legal systems with which the will or the testator is connected and then recommends requiring the court to consider only the internal law (the law apart from the conflict of laws rules) of the foreign jurisdiction if British Columbia conflicts rules point to a foreign legal system as being applicable to an issue arising in connection with a will.

[7] The British Columbia Law Institute advises that it considered the 1988 Hague *Convention on the Law Applicable to Succession to the Estates of Deceased Persons* but decided not to base reform recommendations on its terms. This was not because of its content, but because it had been ratified by only one country, had not been signed by any common law country and was not in force in any country.

[8] Alberta is also in the process of reviewing its succession legislation and conflict of laws issues will be one aspect of that review.

Moving Forward

[9] Preliminary discussions with the jurisdictions indicate some interest in proceeding with this project and British Columbia, Alberta, Saskatchewan and Manitoba have indicated a willingness to participate in a working group. Ontario may also participate.

[10] It has become apparent, however, that the conflict of laws issues are complex and internal expertise to assist in defining the issues and options is not available, perhaps in part because the issues do not yet appear to have been identified as a high priority.

[11] Alberta Justice is interested in partnering with ULCC. Discussions have centered on engaging an expert to prepare a study paper on conflict of laws issues in succession law (both testate and intestate) that would:

1. Provide an overview of conflict provisions in succession legislation in Canadian jurisdictions (and in the 1988 Hague *Convention on the Law Applicable to Succession to the Estates of Deceased Persons*).
2. Examine the conflict issues relating to different succession legislation and types of property and the effect of conflict provisions/principles on estate rights flowing from certain relationships (e.g. married vs. common-law) and options for addressing those issues.
3. Make recommendations for consideration at the 2009 conference and in time for consideration by Alberta for its legislation.
4. Examine issues that might be of specific interest to Alberta for the purposes of its review.

UNIFORM LAW CONFERENCE OF CANADA

[12] Alberta Justice is currently seeking authorization to contribute funds sufficient to engage an expert; part of which would be allocated for the Alberta specific issues.

Next Steps

[13] Guidance is being sought from the civil law section on the project proposal.

[14] If approved, the Chair currently assigned to this project will work with Alberta Justice and Clark Dalton to conclude the arrangement and engage an expert to prepare a study paper as described for consideration at the 2009 annual meeting. A formal working group will likely be formed once the study paper is received.

¹ British Columbia Law Institute Wills, Estates and Succession: A Modern Legal Framework (Report No. 45 June 2006) at p. XIII

² British Columbia Law Institute Wills, Estates and Succession: A Modern Legal Framework (Report No. 45 June 2006) at p. 167

³ British Columbia Law Institute Wills, Estates and Succession: A Modern Legal Framework (Report No. 45 June 2006) at p. 165 and 166