Part 6 Administration of Estates

- Part 6 replaces much of the *Estate Administration Act* and replaces the *Probate Recognition Act*.
  - *Part 10 of the Estate Administration Act* is addressed in Part 3 of the *Wills, Estates and Succession Act*.
  - Much of section 112 of the *Estate Administration Act* – Notice of application for probate or administration – has been moved to the new Part 25 of the Supreme Court Civil Rules, as it deals with procedural matters.
- Division 2 of Part 6 – Small Estate Administration – is not being brought into force at this time.

Division 1 – Application of this Part and Vesting of Property

- Division 1 of Part 6 establishes basic rules applicable to the administration of estates.
- As the title suggests, the provisions in Division 1 set out the application of Part 6 and also address where property vests in the interim between a person's death and the appointment of an administrator (where there is no will).
- Division 1 sections also set out the authority for opposing an application for probate or administration (and other forms of grant) and the authority to compel an executor to apply for probate.

SECTION 101

- Section 101 describes what and to whom Part 6 of the Act applies.
- Section 101 is based on accepted conflict of laws principles.
- Paragraphs (a) and (b) declare that the *Wills, Estates and Succession Act* applies to the estate of a British Columbia resident or domiciliary, and to property of a deceased person situated in this province.
  - Being "ordinarily resident" or "domiciled" are technical terms referring to a person usually living in a certain location or having a special connection with a certain location, even if the person doesn't live there most of the time:
    - Both terms are used as there are slightly different indicators to determine if a person is ordinarily resident as opposed to domiciled in unusual circumstances, for example:
      - Where a person has just moved to a new location with an intention to live there indefinitely.

        - Where a person is living in another location for an extended period of time, but with an intention to return.
        - A person who spends the majority of their time out of British Columbia, but who has the majority of their financial and family connections within the province, such as a worker on an offshore oil rig.
    - It is an excepted principle of law that, if a person is ordinarily resident or domiciled in a particular territory, this gives the courts in that territory jurisdiction over the administration of the deceased's estate.
- Paragraph (c) indicates the *Wills, Estates and Succession Act* applies to all personal representatives acting in British Columbia, including foreign ones intending to administer assets located within the boundaries here.

SECTION 102

- Section 102 carries forward the present law with respect to treatment of intestacy estates from section 3 of the *Estate Administration Act*. It ensures there is no gap in who is responsible for the deceased's estate.
    - If there is a will, then, technically, the executor's responsibility for the estate arises on the date of death. If there is no will, then the court has responsibility for the assets until it recognizes an applicant for administration.
- The wording of section 102 has changed from section 3; however, the effect of the section is the same.
    - The change in wording merely clarified that the estate first vests in the court and then vests in the personal representative once that representative assumes office.

SECTION 103

- Section 103 carries forward the policy of section 8 AND section 10 of the *Estate Administration Act,* and provides for the appointment of a "caretaker" administrator while a legal action challenging the validity of a will or the right to act as a personal representative of the estate is in progress.
    - The court needs to be able to appoint an independent party to care for the estate where there is an issue of the validity of a will or prior grant, and, in turn, the appropriateness of an executor or administrator under that grant is brought into question.
- Subsection (2) specifies the powers of an administrator who is appointed pending legal proceedings. Subsection (2) also makes such "caretaker" administrators eligible to receive compensation for their services, like other personal representatives. However, subsection (2) allows the court to impose special terms regarding the compensation.

- Compensation for these administrators is justified because they are generally providing the same services as any 'normal' personal representative.
    - The compensation provisions have been added to this section for ease of reference and administrative convenience.
- Giving the court the authority to vary the default compensation provisions is reasonable as it allows the court to take into account the unique circumstances of the estate and the duties the administrators have been asked to take on.
    - In certain cases the caretaking may be very straightforward; therefore, compensation should be less. In other cases the legal proceedings may be very complex and the estate in disorder and, therefore, the administrator may be entitled to receive more.

SECTION 104

- Section 104 generally carries forward section 24 of the *Estate Administration Act*; allowing an executor or co-executor to renounce in favour of another person
- However, adding the words "unless the court orders otherwise" to subsection (2) changes the law and allows a person to apply to renounce their right to be an executor on a conditional basis and/or have the court give them the right to re-assert their right to be executor.
    - A person named as executor in a will may do this if the alternate whom they intended to administer the estate after they renounce does not assume the role of executor or if that alternate does not complete the administration of the estate.
- Conditional renunciation may be useful and justifiable where the named executor is ill or elderly and would prefer the estate be administered by another specific person.

An example of how section 104 would operate:

- A will names the will-maker's spouse as the executor without an alternate.
- When the will-maker dies, the spouse is very elderly and finds the prospect of having to administer the estate to be onerous.
- The spouse wishes to renounce in favour of another person (e.g., a family friend or adviser) who would find it easier to discharge those duties, but does not wish to lose the right to take out probate if that person is unwilling or unable to act.
- The court could order that the spouse's renunciation be conditional on the other person identified by the spouse applying for administration with the will annexed.

SECTION 105

- Section 105 carries forward section 25 of the *Estate Administration Act*, although it has been rewritten in an effort to improve clarity.
- Section 105 provides that, if an executor dies before receiving a grant of probate or does not respond to a court application requiring them to obtain a grant of probate, they no longer have a right to be the executor and another person can apply for probate as if that person had not been appointed executor.
  - The reason for section 105 is, if the executor does not take probate (and does not inform the court that they wish to conditionally renounce their right), then that person should no longer have a right to be executor and the estate should be administered by any alternate executor or in accordance with the principles of intestacy.

SECTION 106

- Section 106 carries forward section 109 of the *Estate Administration Act*, and allows a person to oppose a person's application for a grant or probate or administration.
- The section has been reworded to improve clarity; however, the process will still be the same – a person will still file a document with the court registry to oppose the issuing of a grant. The name of the document will be "Notice of Dispute."
- Subsection (2) of the *Estate Administration Act* has not been carried forward because the process that subsection (2) describes no longer occurs, because the court registry's computer system now links the various court registries.

SECTION 107

- Section 107 clarifies two principles:
  1. After the court has issued a representation grant, no one other than a person to whom that grant was made may act as executor of the will or administrator of the estate to which the grant relates.
  2. If an executor does not join in an application for a representation grant, the executor is not responsible for the assets of the estate, whether or not power is reserved to apply for a subsequent grant.
- The reason for section 107 is that giving exclusive authority to those named in a representation grant avoids confusion and disputes over authority to administer an estate, especially where there are people named as co-executors in a will who do not join an application for a grant.
- If a person named as executor does not join in an application for a representation grant, then that person has no authority over the assets of the estate (regardless of whether power is reserved to apply for a

subsequent grant), and, in turn, that person should not be liable for the actions of others in respect of the assets of the estate.

SECTION 108

- Section 108 creates specific legislative authority for the ability to compel a person to apply for probate if they are named as executor in the will.
  - This is known as 'citing' an executor.
  - Currently, the ability to 'cite' an executor is based on common-law rules and the ability of the Court to control its own processes.
- Giving specific statutory authority adds clarity to this area of the law and increases the likelihood of a lay person becoming aware of this ability.
  - At the moment, a person must look to the Supreme Court Civil Rules to learn they have the ability to 'cite' an executor to accept or refuse probate.

Division 2 – Small Estate Administration

- Division 2 of Part 6 (Sections 109 to 120) of the *Wills, Estates and Succession Act* is not being brought into force.
- It is not believed that the small estate procedure is needed.
- The benefit of the small estate procedure was that it would be simpler and faster.
- The new probate rules have prescribed forms very similar to the small estate declaration proposed by the British Columbia Law Institute.
- The new probate rules make a distinction between simple and complex applications and ensure that the processing of an application is dependent upon the complexity of an application, rather than the value of the estate.
- Therefore, there is not any advantage to these provisions, because under the new probate rules **all** applicants will get the same benefits – those with simple applications in particular. For example, where:
  - there is no apparently later will that needs to be explained;
  - there are no issues surrounding the signing of the will;
  - there are no hand written alterations to the will; and
  - there are no documents referred to in the will that appear to be missing.
- The fact Division 2 is not being brought forward will not affect probate fees. If the estate is worth less than $25,000, then applicants still will not have to pay probate fees.

Division 3 – Application for Grant of Probate or Administration

- The provisions in Division 3 of Part 6 set out the rules surrounding applications for a grant of probate or administration.

SECTION 121

- Section 121 roughly corresponds to section 112 of the *Estate Administration Act*.
- It sets out a general obligation to give notice of an application for a grant of probate and administration.
  - An applicant is protected from liability for a loss suffered by a person who did not receive notice if they are found to have made reasonable efforts to learn of their existence or whereabouts.
    - An exception to this protection is where the claim is to recover property or enforce an order under a will variation proceeding.
- Certain procedural requirements that were in section 112 have been moved to the Supreme Court Civil Rules.
  - Procedural requirements are more appropriate for rules and regulations, given the fact that processes and procedures may change over time.
- Section 121 has been amended by section 34 of the *Wills, Estates and Succession Amendment Act, 2011* to clarify that claims to recover property or enforce an order must be under Division 6 of Part 4. Otherwise the section 121 provides a personal representative with virtually no protection.

SECTION 122

- Section 122 corresponds to section 111 of the *Estate Administration Act*.
- It sets out an obligation for an applicant to determine the property and liabilities of the deceased person.
- The section only requires assets and liabilities that pass to the personal representative to be disclosed on an application for grant.
  - A change is that, if the deceased was not normally resident in B.C., then only their property in B.C. need be disclosed, provided the foreign property will be administered by a foreign personal representative or otherwise under the law of a foreign jurisdiction.
  - Requiring disclosure of assets and liabilities that are situated elsewhere and are being administered under foreign law would create confusion about the assets over which the grant extends.
    - In numerous civil law jurisdictions, there is no equivalent to a personal representative to whom assets pass until distribution.

- This section has been amended by section 35 of the *Wills, Estates and Succession Amendment Act, 2011* to allow the form of application for a grant of probate or administration to be set out in the rules of court.
- Disclosure of the assets and liabilities of the deceased is a requirement of probate procedure for a variety of reasons:
  1. It ensures that executors and administrators search diligently for assets and debts.
  2. It discourages concealment and misappropriation.
  3. It allows potential will variation claimants and creditors to make informed assessments of the value of their rights.
  4. It provides a basis for fixing the amount of security.

SECTION 123

- Section 123 expands the current powers under section 113 of the *Estate Administration Act*.
  - The section now applies to estate documents and assets.
- Section 123 empowers the court to compel production of testamentary writings and attendance by a witness with knowledge of the document. It also allows the production of documents or assets belonging to an estate in response to a subpoena issued by the registrar.

Reason certain provisions are not carried forward:

- Sections 113 (2), 113 (3), and 114 (3) of the *Estate Administration Act* emphasize the duty of a person to answer questions and interrogatories, and liability for contempt in default.
  - These sections are not carried forward because they simply state consequences that flow from the general law of contempt of court.
- Sections 114 (1) and (2) of the *Estate* Administration Act allow the registrar to issue subpoenas.
  - The provisions are not carried forward because they are covered by the Supreme Court Civil Rules, currently Rule 21-5(56) and, when the Wills, Estates and Succession Act is in force, Rule 25-12.

SECTION 124

- Section 124 carries forward the policy of subsections 112 (5.1) to (5.3) and (8.1) of the *Estate Administration Act*
  - It provides that if a person is a minor or mentally incapable the court cannot grant administration until an applicant for probate and administration provides written comments from the Public Guardian and Trustee.
- Section 124 ensures that the Public Guardian and Trustee has an opportunity to uphold their statutory responsibility to protect minors or people who are mentally incapable.

SECTION 125

- Section 125 allows the Public Guardian and Trustee (PGT) to have certain applications be "sealed."
- The effect of such a designation is to direct the court registry that access is not to be provided to a file for 6 months without the permission of the PGT or by an order of the court.
- The PGT may apply to court to extend the sealing for up to an additional 18 months. The maximum amount of time an application may be sealed is ~~2~~ two years.
- The ability to seal a file is balanced by the following factors:
  - All known beneficiaries will receive notice from the PGT (and a copy of the will, if any, and a list of heirs) as part of the application process.
  - The existence of a file will still be noted in the court registry; it is only the contents of the file that will be sealed.
  - If a person does not receive notice and believes they have a claim on the estate, then they may obtain access to the file by making a request to the PGT or apply to the court for access.

SECTION 126

- Section 126 generally compels the Public Guardian and Trustee to pay heirs directly.
- The Public Guardian and Trustee has discretion to pay the inheritance to a third party; however, it is likely that the Public Guardian and Trustee will only do this if it is satisfied that this is clearly in the best interests of the heir.

SECTION 127

- Section 126 gives the Public Guardian and Trustee immunity for the exercise of its discretion to seal an application (s.125) and any decision to pay (or not pay) a third party directly (section126).

SECTION 128

- Section 128 significantly modifies the requirement that applicants for administration provide security. Security will only be mandatory if a minor or a mentally incapable adult is interested in the estate.
  - Currently, under section 16 of the Estate *Administration* Act, security is always required and the applicant must apply to have the requirement for security waived, in accordance with section 17 of the *Estate Administration Act*.
- Subsection (1) paragraph (b) states that the court may order that security be provided if there is an application requesting security by an interested party.

- Subsection (2) gives the court the ability to assign an administration bond or other security to a third party.
  - Typically this will be a beneficiary or intestate successor who is willing to pursue a defaulting administrator to recover losses to the estate for the benefit of all interested persons.
  - The third party is entitled to collect the administration bond or security if there is a default by the executor or administrator.
- Section 128 has been amended by section 36 of the *Wills, Estates and Succession Amendment Act, 2011* to make it clear that security may be in any form acceptable to the court and specify that, in lieu of security, the court has the ability to restrict the powers of the administrator that may be exercised without prior approval of the court or the Public Guardian and Trustee.
  - An example of a restriction on authority is that the administrator may have to obtain the approval of the court before selling the deceased's house.
- Security has been changed from being mandatory to only required on application (unless a minor or mentally incapable child is interested) for the following reasons:
  - The present legislation does not reflect actual practice – the default is that security must be provided; however, in practice security is usually dispensed with by the court.
    - This is because of the cost of security, which is payable out of the estate, and because administrators are often members of the deceased's family and get consent.
  - Requiring a person to either provide or dispense with security adds complexity and delay, increasing the overall cost of an administration.
  - While claims on security do occur, it is fairly infrequent.
- Section 128 recognizes that there are a variety of ways to safeguard the assets of the estate:
  - There is no reason to prescribe a form of security as long as the security is acceptable to the court.
  - The court also may be satisfied that sufficient safeguards can be accomplished by placing restrictions on the estate, rather than requiring security.
    - Even where security is presumptively required, the court may be satisfied that the prospective administrator's financial solvency is sufficient and that no additional safeguards are required.
  - Assigning the security to an interested beneficiary allows collection of the bond without imposing a cost on the government. For example:
    - a person applying for administration is required to use their car as security. The car remains in possession of the person but can be seized if they breach their responsibilities as executor. If a breach occurs the court may assign the security to a beneficiary and that beneficiary is responsible for the costs of seizing the car.

Division 4 –Grant of Probate or Administration

- The provisions in Division 4 of Part 6 addresses issues related to the issuing of a grant of probate or administration.

SECTION 129

- Section 129 sets out the grounds on which a grant of probate or administration may issue from a British Columbia court.
- This section is essentially a codification of the common-law.
  - It is useful to explicitly address conflict of laws issues to clarify the law and prevent uncertainty and litigation.
- This section has been amended by section 37 of the *Wills, Estates and Succession Amendment Act, 2011* to add subsection (3), which permits a registrar of the court to issue a grant of probate or administration, provided the application is unopposed.
- Subsection (1) relates to the generally recognized grounds of jurisdiction in relation to succession, which is the residence or domicile of the deceased or the presence of assets requiring administration within the territory of the court.
- Paragraph (1) (b) (iii) has been added to account for situations in which a personal representative must be appointed for the purpose of bringing or defending a legal proceeding in British Columbia.
  - Paragraph (1) (b) (iii) has been amended by section 23 of the *Wills, Estates and Succession Amendment Act, 2011* to replace references to "an action" with references to "a proceeding."
    - This change increases the flexibility in how issues be commenced. The change to "proceeding" allows matters to be commenced by Requisition or Petition, rather than only by action.
- Subsection (2) gives a residual discretion to the court to grant probate or administration even if there is no property belonging to the estate in British Columbia and the deceased was not resident or domiciled here.
  - While such a grant might not be recognized abroad, it may be necessary for an estate to be represented for a domestic purpose, for example:
    - The deceased lived in a foreign country and has no assets in British Columbia. However, the deceased's business interests require a representative to carry out some legal act in British Columbia, such as the execution of a document.

SECTION 130

- Section 130 sets out an order of priority among potential administrators.
  - Currently, there is no statutory priority regime and, if there is a priority dispute, it is settled in accordance with the court practices.

- The priority regime specifically allows beneficiaries to nominate people to act upon their behalf.
- A statutory hierarchy of applicants for a grant of administration has been added to the legislation for the following reasons:
  1. It is thought that a statutory hierarchy of applicants for a grant of administration will reduce uncertainty for families.
     - There should be less scope for conflicts of interest to produce discord between administrators and intestate successors if there is an established order of priority.
     - Success often depends on the measure of consent that an applicant can obtain from the beneficiaries at a similar level of priority. This should also minimize the potential for conflict.
  2. A hierarchy of potential administrators is a feature of 'estates' legislation in a number of other provinces and territories:
     - Alberta
     - Newfoundland and Labrador
     - Saskatchewan
     - Northwest Territories
     - Nova Scotia
     - Nunavut
- The hierarchy includes "whom the court sees fit to appoint" as the final category of potential administrators for the following reasons:
  1. If a sufficient consent to be appointed as administrator is not obtainable by a successor who is not included in the hierarchy, then there is little benefit in having further rankings of applicants.
     - If there is no agreement, then the court might as well appoint anyone with evident integrity who is able and willing to get the job done.
  2. Having this category also results in a relatively compressed, simple hierarchy.

SECTION 131

- This section establishes criterion for the priority given to applicants for a grant of administration with will annexed.
  - This is a situation where the deceased has made a will but either the will does not name an executor or all executors and alternate executors named in the will are dead or are unable or unwilling to administer the estate.
- In these circumstances priority is based on the level of consent the applicant has from other beneficiaries.
  - The level of consent that confers priority to a grant is the consent of the beneficiaries who collectively hold "a majority in interest" of the estate, (i.e., more than 50 per cent of the value).
- The court is given residual authority to appoint any person they deem to be fit if no beneficiary applies or if no beneficiary can obtain the necessary consents.
- By establishing a criterion for the priority given to applicants for a grant of administration, there should be less room for conflict between the

members of the deceased's family about who is the right member to take out the grant.
  - A criterion of unanimous consent is impractical, as it favours obstructive and self-serving behaviour.
  - Requiring the consent of the beneficiaries who hold collectively "a majority in interest" of the estate prevents an individual with a small interest in the estate from exerting a disproportionate influence on the selection of the administrator.

SECTION 132

- Section 132 gives the court the power to reject an application from a person who would otherwise have priority under sections 130 and 131, and appoint another person whom the court considers appropriate.
- It may be necessary for the court to have this discretion in certain circumstances, for example:
  - The deceased had a "blended family" with children from the first and second marriages and there is clear evidence of animosity between the children from different marriages. Even though a child has the consent of the beneficiaries with a majority in interest this may simply represent the consent of their full siblings. In such a circumstance, the court may wish to appoint a neutral third party to administer the estate to protect the children from the other marriage.

SECTION 133

- Section 133 clarifies that if a person dies leaving a will and the will does not dispose of all of that person's estate, then a grant of probate (or a grant of administration with will annexed) operates as a grant of administration for the part of the estate that is not disposed of by the will.
  - This is known as a "partial intestacy" and it is relatively uncommon – because a will usually has a "residue" clause, which ensures that all property not specifically dealt with is divided among specified beneficiaries.
- Granting administration of estate property not disposed of under the will to a person who is already applying to administer the estate that passes under the will is convenient, efficient and likely corresponds with the will-maker's wishes.

SECTION 134

- Section 134 carries forward section 12 of the *Estate Administration Act*.
- The section accomplishes three objectives:
  1. It allows the court to appoint a guardian or other suitable person in place of a minor who is the sole executor under a will.

- Because a minor is not competent at law to act as an executor, there needs to be a mechanism for another person to step into the minor's place. Guardians are the first logical choice to do so because they are entrusted to act in the best interest of the minor.

2. It allows the court to revoke the grant to the guardian and grant probate to the former minor when they reach majority.
   - This upholds the will-maker's intent.
   - The grant will only be revoked if the minor requests it. If the minor is satisfied with the guardian continuing to administer the estate, then the grant will not be revoked.
3. It gives the court the authority to limit the grant of administration or place terms on the grant.
   - Giving the power to place limitations on a grant of administration granted to a guardian or other person in place of a minor allows the court to protect the minor's interests.
   - The guardian can be authorized to handle urgent matters, such as the payment of debts and disposition of perishables, but the collection and distribution of the high value assets can wait for the minor to come of age.

SECTION 135

- Section 135 accomplishes two objectives:
  1. Subsection (1) carries forward the present policy of section 5 of the *Estate Administration Act*.
     - Without subsection (1), a personal representative would have no ability to sue for losses to the estate arising prior to being appointed executor or administrator,
  2. Subsection (2) codifies a limited extension of the doctrine of "relation back".
     - It adds a new provision codifying the rulings of the Supreme Court of Canada in *Davis v. Auld* 1938 CanLII 26 (SCC) and of the British Columbia Supreme Court in *Re Phillips Estate,* 1997 CanLII 3154 (BCSC).
     - These rulings relieve a personal representative from liability for loss and damage to the estate occurring before the grant of administration, when the personal representative lacked authority.
- However, despite section (1), the personal representative will be liable for a loss if liability would have been present regardless of whether a grant had issued or not, for example:
  - If the personal representative intermeddled in the estate (i.e., dealt with the deceased's assets) and this resulted in a loss, then subsection (1) will not provide relief; for example:
    - Person A and Person B are named as executors in a will. After the will-maker dies A and B jointly decide to sell the deceased's car to pay off a debt. Person B decides not to join the application

for probate and Person A is the only one who is appointed as an executor. The beneficiaries satisfy the court that the car was a classic and was significantly undervalued when it was sold. Both A **and** B would be personally liable for the loss associated with the sale of the car.

Background – Doctrine of "Relation Back"

- As an executor is appointed under the will, a grant of probate is considered to relate back to the time of death and to confirm the executor's title and authority from the point of death. In contrast, an administrator's title and authority stem only from appointment by the court and therefore only arises at the time the grant is issued.
- However, because an administrator only gets authority when the grant is issued, they would have no authority to sue for losses to the estate arising between the time the person died and the time the grant was issued, or to recover estate assets that may have been dispersed during this time.
  - To address this issue, court judgments gave limited effect to the 'relation back' doctrine to prevent the possibility of unrecoverable loss to estates subject to grants of administration.

SECTION 136

- Section 136 clarifies that after the court has issued a representation grant no one other than a person to whom that grant was made may act as executor or administrator.
  - Giving exclusive authority to those named in a representation grant avoids confusion and disputes over authority to administration of an estate, especially where there are non-proving executors.
- The section makes specific reference to the fact that power may be reserved to another person to apply for a subsequent grant.
  - This is in accordance with section 104(2) - Renunciation of Executorship.

SECTION 137

- Section 137 corresponds to sections 22 (1) and 23 of the *Estate Administration Act* and protects a third party who makes a transfer of property or a payment in good faith, relying on a grant that is defective or irregular.
  - The reason for section 137 is that innocent third parties should not suffer a loss or face consequences for actions taken in reliance on a grant that is defective.
- Section 137 extends the principles in sections 22 and 23 of the *Estate Administration Act* to include transfers of property, as well as payments.
  - There is no principled reason why the protection should be limited to payments and not property

- In order to claim the benefit of this section, the payment or transfer would have to be made before the third party received notice of revocation of the grant.

Division 5 – Foreign Personal Representatives, Resealing Foreign Grant and Ancillary Grant

- Division 5 relates to foreign grants and foreign personal representatives.
- It carries forward provisions currently found in the *Probate Recognition Act* and the Supreme Court Civil Rules.
- The new power to 'cure' defective wills is extended to foreign wills brought to British Columbia.

SECTION 138

- Subsections (1) to (3) of section 138 carry forward the principles of the *Probate Recognition Act* and allow a foreign grant from a recognized jurisdiction to be 'resealed' by a British Columbia court.
  - 'Resealing' means that the court in British Columbia simply confirms that a foreign court has issued a grant; it does not look behind the grant and determine whether it was proper to issue the grant.
  - The following jurisdictions are prescribed by regulation as jurisdictions that can have their grants resealed:
    - the United Kingdom,
    - all Commonwealth jurisdictions with common-law legal systems similar to that of British Columbia,
    - Hong Kong, and
    - all U.S. states
- There are two important differences in subsections (1) to (3) from the *Probate Recognition Act*:
  1. There is no requirement for reciprocity from recognized jurisdictions.
  2. If the deceased was not domiciled in British Columbia (e.g., they were a German national who spent most of the year in Germany, but had a vacation home in Whistler), then the person applying to reseal the grant is only required to disclose assets and liabilities situated in British Columbia that are to be administered under the authority of the resealed grant.
- Subsection (4) moves authority for ancillary grants from the Supreme *Court Civil Rules* (Rule 21-5 (59)) to legislation. It allows an ancillary grant to be issued when a foreign grant cannot be resealed.
  - Moving authority for ancillary grants from the *Court Rules* makes this authority easier to locate and makes the grant of authority consistent with other similar types of authority, such as the authority to reseal a grant.

SECTION 139

- Section 139 carries forward the court's ability under Supreme Court Rule 21-5 (59) to grant administration of assets located in British Columbia to a person appointed by a foreign personal representative under a power of attorney.
  - This power is useful because it may not be practical for the foreign personal representative to travel to British Columbia to administer assets here.
  - Because this is a substantive right, it is appropriate to relocate the authority in legislation.

SECTION 140

- Section 140 affirms that the curative power (in section 58) may be used in relation to a will that is the subject of a resealing application or another application under this Division.
- It is necessary to specify that the curative power applies to foreign wills because the sections providing for the recognition of a foreign will presume that the document **is** recognized as a will. Therefore, the court may first need to recognize the foreign document as a will using its curative power before issuing grant. For example:
  - A holograph will (a completely handwritten document which is not witnessed) is executed in Alberta, where such wills are valid, and the estate includes a condominium at Whistler. Because the condominium is immovable property (land), succession to it is governed by the law of the place where it is located, which is British Columbia. Under present law, the Ontario probate of the holograph will could not be resealed in British Columbia, nor could an ancillary grant or original grant be obtained. The foreign representative would have to apply for administration in British Columbia, as if the deceased died without a will.
  - The introduction of the curative "dispensing power" in section 58 allows the court the discretion to admit a document to probate despite formal defects if the court is satisfied the document embodies the deceased's final testamentary wishes. Rather than requiring the applicant to make a new application for probate in B.C. in order to utilize the curative power of section 58, it is preferable to allow them to simply reseal the foreign grant.

Division 6 – Revocation of Grant of Probate or Administration

SECTION 141

- Section 141 protects a grant which issued when notice was not provided to all persons entitled, but after the applicant had made reasonable efforts to ascertain the existence or identity of a person entitled to notice and locate that person.
  - Section 141 reverses the decision in *Re Hoicka and Royal Trust Corporation of Canada*, 1984 CanLII 390 (BC SC). In Re Hoicka, the court held that a grant of probate or administration is potentially defective if notice of the application was not given to a person entitled to receive notice.
  - The reason for reversing this decision is that, revoking a grant of probate or administration creates problems; because a new grant will have to be obtained and issues of liability may arise in connection with steps taken in good faith under the initial grant before its revocation.
- If the applicant has made reasonable efforts to ascertain the existence or identity of a person entitled to notice and locate that person, then, on balance, it is less harmful to potentially prejudice the person entitled to notice than to prejudice the applicant who acted in good faith in obtaining the grant.
  - As well, section 155 provides protection to an unknown person entitled to notice, because they can still seek their share of the estate from the other beneficiaries.
    - Seeking their share from the other beneficiaries is reasonable because the other beneficiaries received more than their share, due to the fact the unknown person did not receive their share.
- Section 141 has been amended by section 38 of the *Wills, Estates and Succession Amendment Act, 2011* to clarify subsection (2).

Division 7 – Personal Representatives – Powers, Duties and Liabilities

- Division 7 of Part 6 sets out the authority and protection given to personal representatives.

SECTION 142

- Section 142 (1) gives personal representatives the same powers to deal with the estate as the deceased had.

    - This ability, to do anything the deceased could, is fettered by subsection (2), which requires the personal representative exercise their authority in the best interests of the beneficiaries.
- A will-maker can override any of these default provisions and choose to limit a personal representative's power by expressing a contrary intention in the will.

SECTION 143

- Section 143 describes when the *Trustee Act* applies to personal representatives.
- Currently, the *Trustee Act* and the *Estate Administration Act* both contain provisions which apply to personal representatives. This is useful because the obligations of trustees and personal representatives are similar. However, it can result in confusion as to which Act is intended to operate.
    - An effort has been made to move any provisions that only apply to personal representatives to this Act.
    - However, some provisions that apply to both trustees and personal representatives continue to be located in the *Trustee Act*. Section 143 clarifies which sections of the *Trustee Act* apply and when those sections apply.

SECTION 144

- Section 144 reproduces section 10 of the Trustee Act and abolishes the rule first established in the case of *Allhusen v. Whittel*.
    - Section 10 has been relocated to the *Wills, Estates and Succession Act* because it only applies to personal representatives.
- The rule in *Allhusen v. Whittel* only applies when there is a life tenant.
    - Life tenants will be less common under the *Wills, Estates and Succession Act*, as spouses no longer acquire a life estate in the spousal home.
    - Because life estates will only arise under the will of a deceased, it remains open to a will-maker to choose to have the rule in *Allhusen v. Whittel* apply.
- While the rule in is *Allhusen v. Whittel* is intended to provide a fairer result between a life tenant and a person who has a remainder interest, the complicated calculations required are generally not deemed worth the effort.

SECTION 145

- Section 145 carries forward section 64 of the *Estate Administration Act*.
- Section 145 provides for a chain of representation when an executor dies without having completed the administration and distribution of an estate. For example:
  - A dies and his will appoints B as his executor.
  - B applies for and receives a grant of probate and starts administering A's estate.
  - Before completing the administration of the estate B dies.
  - B's will appoints C as her executor and C becomes the executor of B's estate.
  - Section 145 allows C to also step in as the executor of A's estate and complete the administration on behalf of B.
    - The alternate executor under A's will can apply to remove C and be appointed as executor of A's estate.
- It is advantageous to have the administration of an estate continue seamlessly, despite the death of an executor.
- NOTE: The chain of representation provided for in section 145 does NOT apply to administrators of an intestacy.

SECTION 146

- Section 146 carries forward section 66 of the *Estate Administration Act*.
- Section 146 accomplishes three objectives, it:
  1. provides a limitation period within which a claim must be brought against an estate;
  2. sets out the procedure by which a personal representative may take advantage of the limitation period; and
  3. exempts from the limitation period two types of claim against the estate:
     1) a claim by a beneficiary or intestate successor to recover a beneficial interest which they claim to be entitled; and
     2) a will variation claim.
- This section balances the rights of creditors and claimants against the estate with the interest of the personal representative and successors of the deceased in completing the administration of the estate within a reasonable time.
  - The limitation period is:
    - six months after the notice is given, if the claim or a part of it is due at the time the notice is given;
    - within six months of the time the claim or a part of it falls due, if no part of it is due at the time the notice is given.
- This section has been amended by section 39 of the *Wills, Estates and Succession Amendment Act, 2011* to modify wording.

SECTION 147

- Section 147 carries forward section 67.1 of the *Estate Administration Act*.
- Section 147 allows for property bequeathed to a beneficiary who cannot be found or who neglects to take delivery to be sold and the proceeds held in trust, or forwarded to the beneficiary if his or her whereabouts are known.
- It is necessary to provide a mechanism which allows the personal representative to settle the estate, while protecting the interests of a beneficiary who cannot be found or who neglects to take delivery of a bequest.
- This section does not prevent a personal representative from applying to the court for an order under section 39 of the *Trustee Act*, which would allow the personal representative to distribute the gift among other beneficiaries entitled under the same gift, or from applying for an order presuming the missing beneficiary to be dead under the *Presumption of Death Act.*
  - The *Survivorship and Presumption of Death Act* will be renamed the *Presumption of Death Act* when this Act comes into force
  - Section 2 of the *Survivorship and Presumption of Death Act*, which addresses survivorship, will be moved into this Act, as section 5.
- A will-maker may exclude the operation of this section through a specific direction in their will.

SECTION 148

- Section 148 carries forward the policy of section 57 of the *Estate Administration Act*,
- Section 148 ensures that, if an executor renounces probate, any dispositions made by the executor(s) who do obtain probate are completely effective and not subject to challenge because the renouncing executor did not participate.
- Section 148 extends the effect of section 57 of the *Estate Administration Act*. Section 57 only applied to land and section 148 applies to any property.
- Section 148 also removes a reference to 'trusts for sale,' which are no longer used. The 'trust for sale' was required at a time when land did not pass automatically to the personal representative.

Division 8 – Personal Representatives – Legal Liability and Legal Proceedings

SECTION 149

- Section 149 makes a personal representative generally liable to creditors and other claimants in respect of valid claims enforceable against the deceased's estate, but only to the extent of estate assets actually coming into the personal representative's hands.
- Subsection (2) clarifies that a personal representative who renounces the office (or a person whose rights to apply for probate are reserved in accordance with an order under section 104(2)), is not liable to claimants, provided they did not actually have possession and control of the assets of the estate.
    - In order to claim the protection from liability in subsection (2) a person must not have intermeddled in the estate, (i.e., they must not have dealt with the assets of the estate in any manner or held themselves out as being authorized to represent the estate).

SECTION 150

- Section 150 carries forward principles found in sections 58, 59, 63, 68, 69 and 71 of the *Estate Administration Act*
- Section 150 allows a personal representative to bring an action that the deceased could have brought if alive and allows actions to be brought against the deceased's estate.
    - The rationale for this section is that valid claims should not be barred by the death of the deceased.
- Section 150 is balanced by section 146, which allows the personal representative to give notice to potential claimants, requiring them to commence an action within 6 months of notice.
- While this section largely reflects existing law, it removes an ambiguity in section 59 (6) of the *Estate Administration Act* as to whether an action may be commenced against an estate for a cause of action that is not based on tort (such as a claim based on breach of contract) if no personal representative has yet been appointed.
    - Section 150 clearly permits such an action to be commenced.
- Section 150 has been amended by section 23 of the *Wills, Estates and Succession Amendment Act, 2011* to replace references to "an action" with references to "a proceeding".
    - This change increases the flexibility in how issues be commenced. The change to "proceeding" allows matters to be commenced by Requisition or Petition, rather than only by action.
- Section 150 has also been amended by section 40 of the *Wills, Estates and Succession Amendment Act, 2011* to replace the word "party" with

two paragraphs that better describe a person who does or may have a cause of action.
  - Because the word “party” is used in other legislation to describe a person who is part of a legal proceeding, the use of “party” in this section may be narrowly interpreted to mean that a cause of action is only preserved if a legal proceeding has **already** been commenced.
  - It is intended that the cause of action be preserved regardless of whether it has been commenced.

SECTION 151

- Section 151 overcomes a gap in the present law, by allowing a beneficiary or an intestate successor to bring or defend proceedings on behalf of the estate in the name of the personal representative.
  - Approval of the court is required.
- Currently a beneficiary or an intestate successor is not permitted to bring or defend proceedings on behalf of the estate if the personal representative refuses or is unable to do so.
  - Therefore, if a beneficiary wishes to bring an action and is faced with a refusing personal representative, the beneficiary must apply to remove the personal representative.
- While a personal representative can be removed in accordance with section 158, it may not be convenient or useful to remove a personal representative in order to bring or defend a proceeding. The personal representative may be doing a fine job of administering the estate, but may simply have differing views than the family of the deceased on the risk and return of bringing or defending an action. For example:
  - The personal representative is primarily concerned with preserving and distributing the estate. Therefore, they may be more risk adverse than the beneficiaries and more conservative in their assessment of the potential for success in bringing an action. However, the beneficiaries may be willing to pursue an action, either for non-monetary reasons or because the potential return is deemed worth the risk;
  - With respect to defending an action the personal representative may feel that settling an action against an estate is more cost effective than defending the claim, as again their primary concern is preserving the estate. Whereas, family members may believe that it is worthwhile to defend the good name of the deceased even though there may be a potentially higher cost in doing so.
- The procedure contemplated by section 150 is similar to the derivative action in company law. Sections 232–33 of the *Business Corporations Act* permit a shareholder or director to bring or defend proceedings on behalf of a company in certain circumstances.
- NOTE: Any person, not only a beneficiary or intestate successor, may be given control of the conduct of the proceeding under subsection (4).

SECTION 152

- Section 152 corresponds to section 72 of the *Estate Administration Act* and provides a means by which the personal representative can free the estate from ongoing liabilities.
  - However, section 152 differs from section 72 because it extends to **any** contract binding the estate that requires obligations under it to be performed in the future (i.e., any "executory contract"), not only to leases entered into by or assigned to the deceased.
- Section 152 and allows for the distribution and settling of the estate in a timely manner.
  - The personal representative addresses ongoing liabilities under an executory contract by assigning it to a third party, paying the liabilities due under the contract up to the time of the assignment, and setting aside a reserve adequate to meet any proven sum payable under the contract by the deceased.

SECTION 153

- Section 153 provides that the interest of a beneficiary who is a minor must be held by the Public Guardian and Trustee until the beneficiary reaches majority, unless the will appoints a private trustee for the minor's interest.
- Section 153 corresponds to section 75 of the *Estate Administration Act*; however, section 153 is expanded to include property in which a minor has an interest other than money.
  - It makes sense to expand the section to include property other than money because all property should be protected from misappropriation.
- As section 153 includes property other than money, the section also gives the Public Guardian and Trustee the discretion to convert non-monetary assets into money or to transfer the non-monetary assets to the minor beneficiary in kind.
  - The ability to convert or transfer non-monetary property is necessary because such property may decrease in value and there are practical limitations on the ability of the Public Guardian and Trustee to preserve and maintain some kinds of property for the entire period of minority (such as an exotic animal).
- Subsection (2) also allows the Public Guardian and Trustee to decline to accept a non-monetary asset in which a minor is interested and recommend that the court appoint a private trustee.
- Subsection (3) relieves a personal representative from having to transfer the interest of a minor to the Public Guardian and Trustee if the court appoints a private trustee to take charge of the interest until the minor reaches majority.
  - A competent and willing private trustee is often preferable to the beneficiary and the family of the deceased.

SECTION 154

- Section 154 changes the present requirement for notice to creditors, which is found in section 38 of the *Trustee Act*, by removing the requirement to publish notice in newspapers.
  - Under section 154 only a single advertisement in the British Columbia Gazette is required.
- The requirement that creditors, or other persons having claims against the estate, present their claims within a specified period of time has been extended from 21 days to 30 days from the date of publication.
  - After this time the personal representative will be free to distribute the estate without liability for claims that have not been brought forward.
  - The section does not apply to will variation claims, which have their own limitation periods specified in Division 6 of Part 4 (Variation of Wills).
- Dispensing with newspaper advertisements is justified because such advertisements are extremely expensive and are not considered to be effective for the following reasons:
  - Many newspapers circulate in only one city, or even only circulate in certain municipalities within a larger metropolitan area; whereas, a deceased's creditors may be spread across the province.
  - It would be unreasonable to require a personal representative to advertise in multiple newspapers, whereas, advertising in only one cannot realistically be expected to bring a death to the attention of all creditors.
  - In addition, the intervals between newspaper advertisements that are required by section 38 give rise to several weeks' delay.
- Requiring the personal representative to only advertise in the Gazette simplifies the procedure to the advantage of both creditors and the personal representative; as a search for the advertisement would only need to be conducted in one source.
  - To facilitate access to creditors, Part I of the Gazette (where notices and advertisements of this kind are published) will be searchable electronically by reference to the name of a deceased person without a subscription fee.

SECTION 155

- While section 155 is phrased as a prohibition on distributing an estate within 210 days (approximately seven months), its effect is to relieve a personal representative from liability if they distribute the net estate after seven months have passed since the issuance of the grant.
- However, subsection (2) prevents the distribution even after 210 days if a proceeding has been commenced that may alter the distribution of the estate.
  - If a proceeding has been commenced then a court order is required before a personal representative may distribute the estate.

SECTION 156

- Section 156 clarifies that a personal representative granted administration with will annexed is also the trustee of any trusts under the will, if the will does not appoint a trustee.
  - This section merely codifies what is generally considered to be the effect of a grant of administration with will annexed if there are will trusts and the will does not appoint a trustee.
- The presumption in section 156 is subject to a contrary direction by the court.
  - Therefore, an interested party can apply to court to argue that the personal representative should not be the trustee of any (or certain) trusts under the will.
    - For example, a beneficiary may do this where the personal representative would be in conflict of interest if they were a trustee.

Division 9 – Discharge, Removal and Substitution of Personal Representatives

SECTION 157

- Section 157 continues the principle found in section 27 of the *Estate Administration Act* that a personal representative cannot unilaterally withdraw from office. Section 157 requires a personal representative to apply to the court to be discharged from their responsibilities as personal representative.
- Section 157 (1) no longer refers to being discharged as trustee, as is done in section 27. This is to better separate the responsibilities of a person as a personal representative and responsibilities as a trustee, where their duties cover both.
  - A person wishing to be relieved of their obligations as trustee will need to apply under the *Trustee Act*, although this can be done in a joint application.
- Subsection (3) contains a significant new feature, allowing a personal representative to obtain a discharge without notice (desk order) in certain circumstances.
  - Subsection (3) reduces costs when there are no outstanding issues that would require the persons interested in the estate to be notified.
  - Subsection (3) has been amended by section 41 of the *Wills, Estates and Succession Amendment Act, 2011* to clarify that notice is to be provided to the guardian responsible for the minor's financial affairs or a nominee of the guardian.
- Subsection (5) corresponds to section 29 (3) of the *Estate Administration Act*. The order of discharge operates as a release from liability for acts

and omissions of the former personal representative while serving in that office, but only if the estate accounts have been passed or consented to.
    - However, the order does not operate as a release of claims arising from misfeasance, misappropriation or breaches of trust that have been concealed.
        - This means that if an executor has stolen from the estate and concealed this information when obtaining their discharge, they cannot rely on the discharge to protect them from liability.
- Subsection (6) further clarifies that a discharge obtained under section 157 only operates to discharge the applicant as a personal representative, not as a trustee.
    - In conjunction with the change in subsection (1), section (6) reinforces the separation between the role of personal representative and the role of trustee.

SECTION 158

- Section 158 is new. It specifies that a person with an interest in the estate can apply to have the court remove or "pass over" a personal representative.
    - To "pass over" means to grant probate or administration to a co-executor or alternate executor or to appoint someone ranking lower in the hierarchy of potential administrators, as set out in sections 130 and 131.
    - The court has been given flexibility to remove or pass over on grounds other than those specifically listed.
        - This authority preserves the existing non-statutory jurisdiction on which the Supreme Court currently relies to remove a personal representative
- In subsection (2), the words "A persons having an interest in an estate" is intended to at least include all beneficiaries or intestate successors, as well as creditors and co-executors or co-administrators.
- Paragraph (3) (e) provides that, if the personal representative is the sole beneficiary, then a conviction for an offence involving dishonesty and bankruptcy are not grounds for removal, unless there is also a creditor who is owed more than $10,000 (which is specified by regulation).
    - If the personal representative is also the sole beneficiary, then their bad character is not a concern, for they will be acting solely in their own interest (i.e., they are not going to use their position as personal representative to steal from themselves).
    - However, there would be a concern if the interests of a creditor could be prejudiced.
- Subsection (4) clarifies that removal under this section is only removal from the office of personal representative not as trustee.

- Paragraph (3) (g) provides that, if a person is a committee under the *Patients Property Act,* then this is a reason they may be passed over or removed.
  - While the paragraph is drafted broadly it is intended to address personal representatives who assume that role through the operation of Section 17 of the *Patients Property Act*, which automatically vests in the committee of a mentally incapable person all the powers that person had as a personal representative.
  - Given that the committee may be a stranger to other beneficiaries, there should be a mechanism to allow these beneficiaries to argue that the committee should be removed or passed over.
- Section 158 brings British Columbia in line with Ontario and lays groundwork for amendments to the *Trustee Act* proposed by the British Columbia Law Institute.

SECTION 159

- Section 159 corresponds to section 30 of the *Estate Administration Act*. It authorizes the appointment of a replacement for a personal representative who is discharged or removed.
- Paragraph (1) (b) makes it clear that the substitution of a personal representative as a testamentary trustee would be carried out under the authority of the *Trustee Act*, although it could be done concurrently with the appointment as personal representative under the *Wills, Estates and Succession Act*.
  - Having the substitution of a testamentary trustee carried out under the provisions of the *Trustee Act* (even if done concurrently with the appointment of a personal representative) further clarifies the separation of the personal representatives and trustees.
- Subsection (3) clarifies the powers and status of the replacement personal representative. Paragraph (3) (c) makes it easier for the replacement personal representative to deal effectively with the estate and the new grant prevents confusion as to who is entitled to represent the estate.
  - These changes should minimize cost and delay in administration.
- Subsection (4) clarifies the law by providing that a new appointment operates to revoke the prior grant. This introduces more certainty as to the authority of a grant made to a personal representative who is later discharged (or who is removed and replaced).
  - Under current law, removal of a personal representative from office by the court is not generally considered to be a ground for revocation of a grant of probate or administration. Instead, the usual remedy is the appointment of a judicial trustee.
  - This current process can result in confusion, because a grant confirms a named individual or individuals as having authority to administer an estate. Therefore, if it is not revoked then the judicial trustee must provide third parties they are dealing with both the grant (in the original

trustee's name) and the order appointing them as judicial trustee in that person's place.

SECTION 160

- Section 160 clarifies the divestiture of the estate from former personal representatives and its vesting in newly appointed ones.
  - This section works with section 158.
  - It is beneficial to clarify what happens upon the discharge, removal, addition or substitution of the personal representative.
- Section 160 emphasizes that vesting is as complete as if the title to the estate had actually been transferred to the new personal representative by the former one.
- The effect of subsection (5) is that section 260 (2) of the *Land Title Act*, which requires that land be registered in the name of the personal representative before further dealings in the land may be registered, applies to a vesting of land under section 160.

SECTION 161

- Section 161, particularly subsection (1), is aimed at encouraging the proper handover of property and records to a replacement personal representative.
  - The experience of practitioners is that when personal representatives are replaced against their will, the new personal representative often encounters difficulty in obtaining custody of assets and documents relating to the estate and its administration.
  - Given that there may be some ill will held by the personal representative being replaced, there needs to be clear obligations to ensure the proper handover of property and records to a replacement personal representative.
- Subsections (2) and (3) recognize that transferring control of an estate may require execution of various documents by the retiring or former personal representative so that the new personal representative's authority will be evident to third parties who have been dealing with the former personal representative.
- Subsection (3) reverses the position under section 22 (2) of the *Estate Administration Act* and prevents a former personal representative, whose grant has been revoked by reason of discharge or removal, from retaining funds out of the estate to reimburse expenses incurred.
  - The present section 22 (2), which permits such retention of estate funds, is seen as facilitating misappropriation.
  - A former personal representative is still entitled to be reimbursed for expenses incurred; they are just not allowed to retain estate funds to do so.

- It is open to the former personal representative to seek an order from the court allowing retention of amounts sufficient for reimbursement of proper expenses.

Division 10 – Devolution of Land

SECTION 162

- For the most part, section 162 preserves the existing law in British Columbia on devolution of real property on death as set out in section 77 and section 78 of the *Estate Administration Act*
- However, section 162 makes one significant change. Unlike section 77 of the *Estate Administration Act*, real property (land) and personal property are applied equally towards the payment of funeral and administration expenses, debts and legacies; although, a contrary intention may be expressed in a will.
  - There are three reasons for changing the presumption in section 77 that land be applied equally toward the payment of debts:
    1) The basis for the rule in section 77 is no longer applicable.
       - Historically, land was not available to the personal representative for payment of the deceased's debts (because it passed to the beneficiaries directly). Section 77 perpetuated the distinction between the application of land and personal property towards debts, despite the fact that the law changed and land vested in the personal representative.
    2) The historic significance of land as a form of wealth has not persisted.
       - In modern times, other forms of wealth (such as securities) may be equally or more significant, both in value and in relative importance to the will-maker and the beneficiaries.
    3) The distinction between land and personal property is not fair.
       - For example, an estate consists solely of a painting worth $100,000 given to A and a house worth $500,000 given to B. If the will-maker died owing $100,000, the beneficiary who is to receive the painting would receive nothing because the painting, as an item of personal property, must sold be applied towards debts before the house is sold.

SECTION 163

- Section 163 corresponds to subsections 79 (2) and (3) of the *Estate Administration Act*. It permits a personal representative to transfer land to a beneficiary or intestate successor subject to debts of the estate.
  - This is a useful technique to employ when a person entitled to the land is willing to accept a transfer of the land subject to a charge (to pay the estate debts), rather than having the land sold to satisfy the debts and actually inheriting only the value of the equity in the land.
  - Section 163 is particularly important given the change in section 162, which makes land equally liable for the debts of the estate. For example:
    - A will gives Child A land worth $250,000 (clear of any mortgages) and Child B specific securities and other personal property worth $250,000.
      - The rest of the assets form the residue of the estate and are to be divided equally.
    - When all the property in the residue of the estate is sold the estate still has $100,000 in debts.
      - The land represents 50 per cent of the estate and therefore must cover 50 per cent ($50,000) of the debt.
    - The land could be sold to cover the $50,000 debt and Child A could receive $200,000. Or under section 163, Child A could consent to receiving the land with a $50,000 charge on it.
- The reason the balance of section 79 of the *Estate Administration Act* is not carried forward is that it mainly concerns “assents” and assents are considered obsolete:
  - The purpose of an assent is to signify that the personal representative does not need to apply the value of the devised land towards the payment of debts of the estate and confirm the beneficial interest in the devised land could therefore pass to the devisee.
  - The Director of Land Titles has indicated that assents are seldom, if ever, seen.
- In accordance with section 163 (2), if a personal representative transfers land to a beneficiary or intestate successor subject to debts of the estate, then the personal representative is no longer personally liable to pay those debts. However, an exception to the presumption created under section 163 is where the personal representative became personally liable to a creditor (for example, under a contract they signed with the creditor) prior to the transfer.

Division 11 – Public Guardian and Trustee

- Division 11 carries forward Part 5 of the *Estate Administration Act*.
- Division 11 has been updated to reflect the fact that official administrators have been replaced by a Public Guardian and Trustee, which is a corporate entity.
  - Official administrators used to be individual people appointed by the government to act on behalf of children and mentally incompetent people, and to be the administrator of last resort for estates within specific geographic areas.

SECTION 164

- Section 164 carries forward section 40 of the *Estate Administration Act* and enables the Public Guardian and Trustee to act as the "administrator of last resort" if there is no one willing or able to act as executor.
- Subsection (2) has been amended by section 42 of the *Wills, Estates and Succession Amendment Act, 2011* to clarify that the Public Guardian and Trustee may apply to administer an estate if the executor has died leaving a will without appointing an executor whose whereabouts are **known**. The intention is that the Public Guardian and Trustee will only act if there are no executors or if the location of the executor is unknown.

SECTION 165

- Section 165 carries forward section 41.1 of the *Estate Administration Act*.
- The section gives the Public Guardian and Trustee the ability to decline to administer estates that are less than a minimum size, due to the fact that the PGT's fees and associated expenses would likely deplete the estate.

SECTION 166

- Section 166 carries forward section 42 of the *Estate Administration Act*.
- The section clarifies that if the Public Guardian and Trustee is granted administration of an estate that the corporate entity has the same rights and responsibilities as any other person who is granted administration.

SECTION 167

- Section 167 carries forward section 51 of the *Estate Administration Act*.
- The section has been expanded to clarify the rights and abilities of the Public Guardian and Trustee and to reflect the fact that the PGT is a corporate entity with agents and employees acting for it.

SECTION 168

- Section 168 carries forward section 53 of the *Estate Administration Act*.
- This section gives the court the power to grant administration of an estate to another person, despite a grant having already been made to the Public Guardian and Trustee.
  - An efficient system to transfer a grant of administration is desirable, as the Public Guardian and Trustee is the administrator of last resort and it is preferable to have an interested party assume responsibility.

Division 12 – Insolvent Estates

- If there are not enough assets (money and saleable property) in a deceased's estate to pay all of the debts the deceased had, then the estate is referred to as "insolvent."
- Division 12 of Part 6 sets out rules to address how the money in the estate is to be applied to pay off the debts.

SECTION 169

- Section 169 carries forward the definition of 'insolvent estate' currently found in section 100 of the *Estate Administration Act*.
- A definition of 'secured creditor' has been added due to its extensive use in division 12.

SECTION 170

- Section 170 carries forward section 101 of the *Estate Administration Act*.
- The section sets out a list prioritizing how a personal representative must apply the proceeds realized from an insolvent estate.
- Section 170 has been updated, so that the list of claims is harmonized with section 136 of the federal *Bankruptcy and Insolvency Act* ("BIA").
  - While the lists in this Act and the BIA are not identical, they achieve a similar priority. The list of preferred claims has been updated to reflect current monetary amounts and other features found in section 136 of the BIA that are not found in section 101 (1) of the *Estate Administration Act*.
    - For example, accelerated rent is not currently allowed by section 101 (1) (e) of the *Estate Administration Act*.
- This section has been amended by section 43 of the *Wills, Estates and Succession Amendment Act, 2011*.
  - The amendment clarifies that a personal representative may only give priority to legal expenses incurred in the administration of the estate (i.e., not legal expenses incurred pursuing legal action on behalf of the deceased).

- The amendment also adds the taxing rights of the Nisga'a and Treaty First Nations to the priority list.

SECTION 171

- Section 171 establishes that a creditor is entitled to claim against the estate a debt owing and payable at the time of death of the deceased, or owing at the time of death but not yet payable.
  - The policy is that a creditor should not be precluded from recovering money owed due to the death of the debtor, as the debt either directly or indirectly increased the size of the deceased debtor's estate and the beneficiaries would unfairly benefit from the unpaid debt.
- Subsection (1) corresponds to section 102(1) of the *Estate Administration Act*.
- Subsections (2) and (3) are new.
  - Subsection (2) provides that the rebate of interest for a debt owing but not payable at the time of death is to be calculated at a prescribed rate (which is set at five per cent by the Wills, Estates and Succession Regulation).
  - Subsection (3) provides that if the estate is insolvent the right to recover interest ends at the date of death, except in the unlikely circumstance that a surplus remains after all creditors and other claimants have been paid.
- Section 102 (2) of the *Estate Administration Act* has not been carried forward.
  - It provides that persons who have paid debts of the deceased for which they were liable as sureties may stand in the place of the creditor and prove the debt in the administration of an insolvent estate.
    - For example, a parent acts a surety for a loan taken out by their adult child. The child dies. Rather than waiting for an administrator to be appointed the parent chooses to pay the debt, as surety. If the parent pays the debt, they step into the position of the debtor to be compensated by the estate.
  - The ability for a surety to be able to seek compensation from the primary debtor (or their estate), after paying a debt on the debtor's behalf, is considered such a fundamental part of the law of sureties that it is not necessary to be stated in legislation.

SECTION 172

- Section 172 replaces section 103 of the *Estate Administration Act* with a section modelled on section 135 of the *Bankruptcy and Insolvency Act*.
  - The reason for this change is that section 103 was considered complex and cumbersome, whereas the approach in section 135 minimizes delay and avoids the complexity and pitfalls of calculating a reserve.
- Section 172 prescribes the following process:

- It requires a personal representative to fix a value for a conditional, contingent or unliquidated claim, and to notify the creditor of the amount at which the claim is valued.
- It treats the value fixed by the personal representative as the value for which the claim is deemed to have been proved unless the creditor or claimant applies to the court.
- It gives the court the authority to re-determine the value of the claim as fixed by the personal representative or confirm the value fixed by the personal representative.

- This section now reflects other tasks the personal representative must perform in deciding whether to accept claims as valid or dispute them.
  - Recourse to the court is only necessary if a creditor disputes the personal representative's valuation.

SECTION 173

- Section 173 corresponds to section 106 of the current *Estate Administration Act*.
- A secured creditor is required to place a value on the security and the total value of the claim. The secured creditor is allowed to prove as an unsecured creditor for the balance not realized on the security, up to the value of the claim.
- If, in the unlikely event, the security is surrendered to the personal representative and becomes part of the estate, the secured creditor can prove as an unsecured creditor for the entire amount of the debt.
- Section 106(2) was not carried forward – as it does not correspond to current bankruptcy law.

SECTION 174

- This section is based on section 108 of the *Estate Administration Act* and is similar to 142 (4) of the *Bankruptcy and Insolvency Act*.
- The section allows a partnership debt, for which the deceased was indirectly liable as partner, to be recovered from the deceased's insolvent estate only after exhaustion of the property of the partner by whom, or the partnership on behalf of which, the debt was contracted.
- The rationale for section 174 is, while partners are jointly and severally liable for debts contracted in relation to the partnership, it would be unfair for creditors of the deceased in an individual capacity to have the deceased's estate diminished by the claims of partnership claimants, if the deceased did not contract those debts and is liable for them only indirectly.

Division 13 – Deceased Worker's Wages

- Division 13 deals with worker entitlements on death.

SECTION 175

- Section 175 carries forward the definition of "worker" from section 120 of the *Estate Administration Act* and includes a person who was a worker within the scope of Part 1 of the *Workers Compensation Act*.

SECTION 176

- Section 176 carries forward section 121 of the *Estate Administration Act* without change.
- This section ensures that wages that accrued to the worker prior to their death are paid to the surviving spouse.

SECTION 177

- Section 177 carries forward section 122 of the *Estate Administration Act* without change.
- This section ensures that wages that accrued to the worker prior to their death are not dealt with as part of the estate, which means the spouse can receive the money more easily and quickly.

SECTION 178

- Section 178 carries forward section 123 of the *Estate Administration Act* without change.
- This section provides some formalities that need to be complied with for the spouse to claim the wages owing to the deceased spouse.
  - The requirements are minimal and help prevent fraud.

SECTION 179

- Section 179 carries forward section 125 of the *Estate Administration Act* without change.
- The section relieves an employer from liability if they rely on an affidavit provided by a person purporting to be the surviving spouse.
  - This protection for employers is necessary to ensure that an employer is willing to rely upon a spouse's affidavit.

SECTION 180

- Section 180 carries forward section 126 of the *Estate Administration Act* without change.
- The section addresses what happens if there is a situation where there is more than one person purporting to be the surviving spouse.
  - The matter is to be resolved by an application to court.
  - It is efficient for the court to continue to have the authority to address this situation
  - Such applications will remain relatively rare and requires a decision by an impartial and independent third party.

Division 14 – Other Matters and Regulations

SECTION 181

- Section 181 is new. It states how notices and consents under this legislation may be validly given where the person entitled to receive them is mentally incapable.
  - It is necessary to provide a mechanism for notice to mentally incapable adults that works with the various provisions governing the representation of mentally incapable adults.
  - Not every representation agreement confers the kind of authority contemplated by section (1) of section 181. For example:
    - Section 7 (1) (b) of the *Representation Agreement Act* allows an adult to make a representation agreement authorizing a representative to assist the adult in making decisions or making decisions on behalf of the adult about "routine management of the adult's financial affairs." What is contemplated by subsection (2) would likely be considered beyond the representative's authority.

SECTION 182

- Section 182 is new. It requires notice be given to each guardian of the minor.
  - Giving notice to the guardian of a minor beneficiary ensures the interests of that beneficiary are protected.
- Normally the parents of a minor will be joint guardians of the minor's person and estate. Thus, a notice could be addressed to both parents. However, if the parents are living separately and still remain joint guardians, each of them must be given notice under subsection (1).
- Section 182 (2) is repealed by section 470 of the Family Law Act.
  - This amendment supersedes the amendment to section 182(2) proposed by section 44 of the *Wills, Estates and Succession Amendment Act, 2011*.

SECTION 183

- Section 183 carries forward section 118 of the *Estate Administration Act* without change.
- The section sets out the procedure for a personal representative to access a safety deposit box.
  - It requires a personal representative to prepare an inventory of the safety deposit box.
  - The inventory must be kept for one year in the safety deposit box and by the person in control of the premises where the box is located.
  - The inventory left in the safety deposit box may only be removed within the one year if the lease or rental of the safety deposit box is terminated.
- The procedure established by section 183 is a worthwhile protection for financial institutions, personal representatives and those beneficially interested in estates. It also assists in standardizing the practices concerning the opening of safety deposit boxes after death.

SECTION 184

- Section 184 empowers the government to make regulations to support the operation of the Act.
- While there are not many regulations, this section is necessary because certain procedural requirements are being moved from the legislation to the regulations or rules of court.
- This section has been amended by section 45 of the *Wills, Estates and Succession Amendment Act, 2011* to clarify the authority to make regulations.